TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 188.

JOHN ROEHM, PETITIONER,

vs.

PAUL R. G. HORST, E. CLEMENS HORST, AND LOUIS A. HORST, LATE TRADING UNDER THE FIRM OF HORST BROS., TO THE USE OF E. CLEMENS HORST AND LOUIS A. HORST.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 16, 1899.
CERTIORARI AND RETURN FILED FEBRUARY 2, 1899.

(17,262.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 8, 1899.

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United States Circuit Court of Appeals for the Third Circuit, September Term, 1898.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Plaintiff in Error,
vs.
PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Bros., to the Use — E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Defendants in Error. } No. —.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

Filed May 20, 1898.

1 UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Paul R. G. Horst, a citizen of the State of New York; E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, late trading under the firm of Horst Bros., to the use of E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, plaintiffs, and John Roehm, of the State of Pennsylvania, residing in the eastern district of Pennsylvania, defendant, a manifest error hath happened, to the great damage of the said John Roehm, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the third circuit, together with this writ, so that you have the same at the city of Philadelphia within thirty days, in the said United States circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 17th day

of March, in the year of our Lord one thousand eight hundred and ninety-eight.

SAMUEL BELL,
Clerk of the Circuit Court of the United States.

Allowed by—
GEO. M. DALLAS,
Circuit Judge.

March 17, 1898.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Paul R. G. Horst, a citizen of the State of New York; E. Clemens Horst, a citizen of the
2 State of California, and Louis A. Horst, a citizen of the State of Illinois, late trading under the firm of Horst Bros., to the use of E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the third circuit, to be holden at the city of Philadelphia within thirty days, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the eastern district of Pennsylvania wherein John Roehm is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, judge of the circuit court of the United States, this 29th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

GEO. M. DALLAS, *Judge.*

I hereby accept service of the above citation.

THOMAS S. GATES,
For FRANK P. PRICHARD,
Att'y for Horst et al.

October Sessions, 1896.

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,	Frank P. Prichard. John A. Garver. 42. Summons Assumpsit.
vs.	
JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.	R. O. Moon.

January 23, 1897.—Præcipe for summons filed. Summons exit returnable first Monday in February next.

3 January 23, 1897.—Plaintiffs' statement filed.

February 1, 1897.—Summons returned served January 25, 1897, with copy of plaintiffs' statement of claim.

February 10, 1897.—R. O. Moon, Esq., appears for defendant.

February 10, 1897.—Affidavit of defence filed.

February 10, 1897.—Rule to plead filed.

February 26, 1897.—Plea filed.

March 5, 1897.—Replication filed.

September 29, 1897.—Testimony of H. Uchtmann, T. A. Livesly and Kola Neis, taken before Webster Holmes, notary public of Marion county, Oregon, filed.

October 11, 1897.—Depositions of E. Clemens Horst, T. B. Lovdal, Rudolph Witterbrock and Charles Schmidt, witnesses on behalf of plaintiffs, taken before Lee D. Craig, notary public, San Francisco, California, filed.

November 3, 1897.—Stipulation of counsel waiving trial by jury and submitting issue to trial by the court filed.

December 13, 1897.—Deposition of William Uhlman, on behalf of defendant, filed.

December 13, 1897.—Trial before Dallas, circuit judge, in accordance with stipulation.

January 27, 1898.—Opinion of Dallas, judge, ordering that judgment be entered as of this date in favor of plaintiffs and against the defendant in the sum of ten thousand one hundred and eighteen $\frac{30}{100}$ dollars ($10,118.30).

February 1, 1898.—Motion and reasons for a new trial filed.

February 23, 1898.—Argued surmotion for a new trial.

February 25, 1898.—Opinion Dallas, judge, discharging rule for a new trial. Judgment entered accordingly.

February 28, 1898.—Bill of exceptions filed.

March 4, 1898.—Plaintiff's bill of costs filed.

March 17, 1898.—Petition for writ of error filed.

March 17, 1898.—Writ allowed (security to be entered in the sum of twenty-two thousand dollars) and issued, and copy lodged in clerk's office for adverse party.

March 17, 1898.—Assignments of error filed.

March 29, 1898.—Bond surwrit of error filed.

March 29, 1898.—Citation issued.

April 29, 1898.—Citation returned; service accepted.

4 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania.

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,	October Sessions, 1896. No. 42.
vs.	
JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.	

UNITED STATES OF AMERICA, *Eastern District of Pennsylvania,* } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October sessions, 1896, No. 42.

It thus contained:—

Be it remembered that on the twenty-third day of January, in the year of our Lord one thousand eight hundred and ninety-seven, Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, late trading under the firm name of Horst Brothers, to the use of E. Clemens Horst and Louis A. Horst by their counsel, Frank P. Prichard and John A. Garver, come into our court here and sue forth therefrom a writ of summons against John Roehm, which, with the endorsement and return thereto, is in the words and figures following to wit:—

5

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,	U. S. C. C., E. D. of Pa., October Sess., 1896. No. 42.
vs.	
JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.	

SIR: Issue summons in assumpsit in the above-entitled case returnable the first Monday of February, *sec. leg.*

FRANK P. PRICHARD,
JOHN A. GARVER,
Attorneys for Plaintiff.

To clerk U. S. C. C., E. D. of Pa.

Endorsed: Oct. sess., 1896. No. 42. C. C. U. S., E. D. of Pa. Horst *et al. vs.* Roehm. Præcipe summons in assumpsit. Filed January 23, 1897. Samuel Bell, clerk. John A. Garver, Frank P. Prichard.

UNITED STATES, } *ss.:*
Eastern District of Pennsylvania, }

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you, that you summon John Roehm, a citizen of the State of Pennsylvania, residing in the eastern district of Pennsylvania, late of your district, if he may be found therein, so that he be and appear before the judges of the circuit court of the United States, in and for the eastern district of Pennsylvania, of the third circuit, at a session of the same court, to be holden at Philadelphia on the first Monday of February next, to answer to Paul R. G. Horst, a citizen of the State of New York; E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citi-
6 zen of the State of Illinois, late trading under the firm of Horst Brothers, to the use of E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, in a plea of assumpsit; and have you then there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 23d day of January, A. D. 1897, and in the 121st year of the Independence of the United States.

[SEAL.]

SAMUEL BELL,
Clerk of Circuit Court U. S.,
Per M.

Endorsed: No. 42. Circuit court, October session, 1896. Paul R. G. Horst, to use of, etc., *vs.* John Roehm. Summons assumpsit. Filed February 1, 1897. Samuel Bell, clerk.

Returnable on the first Monday of February next.

F. P. PRICHARD,
JOHN A. GARVER,
Attorneys for Plaintiff.

January 25, 1897.—At Philadelphia, in my district, served the within writ on John Roehm by giving him a true and attested copy thereof and making known the contents of the same. So answers

JAMES B. REILLY,
U. S. Marshal,
Per ABRAM B. MYERS, *Deputy.*

7 *Statement of Plaintiff's Demand.*

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,

vs.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.

U. S. C. C., E. D. of Pa., October Sess., 1896. No. —.

Paul R. G. Horst, a citizen of the State of New York; E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, late trading under the firm of Horst Bros., to the use of R. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, claim to recover from John Roehm, a citizen of the State of Pennsylvania, who resides in the eastern district of Pennsylvania, the sum of ten thousand five hundred and eighty-four dollars, with interest, from the twenty-fourth day of October, 1896, for breach of contract, under the following circumstances:

On August 25th, 1893, the said firm of Horst Brothers and the said defendant, John Roehm, entered into four written contracts; two for the purchase and sale of Pacific Coast hops of the crop of 1896, and two for the purchase and sale of Pacific Coast hops of the crop of 1897.

The following are copies of the said four contracts:

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, par*ties* of the second part.

Witnesses: That the said parties of the first part agree to sell and deliver to the par*ties* of the second part, and that par*ties* of the second part agree to purchase, pay for and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound. Time of shipment, 20 bales each month October, November, December, January, February, except as hereafter provided.

8

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus

chosen, and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS. (L. A. H.).
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, parties of the second part.

Witnesses: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound. Time of shipment, 20 bales each month March, April, May, June, July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

9 In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS. (L. A. H.).
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, parties of the second part.

Witnesses: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for and receive from the

party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound. Time of shipment, 20 bales each month October, November, December, January, February, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the part*ies* of the second part, other hops, in fulfillment of this agreement, and part*ies* of the second part agree- to receive same.

In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS. (L. A. H.).
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, part*ies* of the second part.

Witnesses: That the said parties of the first part agree to sell and deliver to the part*ies* of the second part, and that part*ies* of the second part agree- to purchase, pay for and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound. Time of shipment, 20 bales each month March, April, May, June July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of a majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the part*ies* of the second part, other hops, in fulfillment of this agreement, and part*ies* of the second part agree- to receive same.

In witness whereof the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS. (L. A. H.).
JOHN ROEHM.

The hop crop is gathered, according to usual custom, in the summer, and the months named in the said contracts are, according to the custom of the trade, the months of that name next after the summer months of the year of the crop.

At the date of the said contracts the firm of Horst Brothers was composed of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst. On June 23d, 1896, the firm of Horst Brothers was dissolved, and Paul R. G. Horst assigned to his copartners, E. Clemens Horst and Louis A. Horst, all interest in the said contracts with the defendant, John Roehm. On June 27th, 1896, the defendant, John Roehm, wrote to the firm of Horst Brothers the following letter:

"PHILADELPHIA, *June* 27, 1896.

Messrs. Horst Bros., 42 Pearl street, New York city.

DEAR SIR-: Yours of the 23d inst. notifying me of the dissolution of the copartnership of Horst Bros. is received. I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, for the furnishing to me of 200 bales of prime Pacific Coast hops of the crop of 1896, and 200 bales of prime Pacific Coast hops of the crop of 1897, which, of course, you
11 cannot fulfill. I therefore consider the contracts as annulled and will make other arrangements for the purchase of the hops that I may need, and you may consider this as release from liability, on your part, to comply with the contracts.

Yours truly, JOHN ROEHM."

To this letter the firm of Horst Brothers, on July 3d, 1896, sent the following reply:

"NEW YORK, *July* 3, 1896.

Mr. John Roehm, No. 856 Charlotte St., Philadelphia, Pa.

DEAR SIR: In answer to yours of the 27th ultimo we beg to say that you have misconstrued the meaning of the notice of dissolution sent out by us to the trade. Its meaning was simply that no new contracts would be made and no new business undertaken by the firm of Horst Brothers. So far as the firm or business is concerned, the firm will discharge its obligations and will try to collect its claims; it does not ask for any releases or discharges, and will punctually live up to all contracts which it has made with you.

Yours respectfully, HORST BROS.,
In Liquidation.

In October, 1896, plaintiffs made the first shipment of twenty (20) bales of hops required under the above contracts, and sent to the defendant, John Roehm, the invoice and bill of lading covering the same.

On October 24th, 1896, defendant sent to plaintiffs the following telegram and letter:

Pacific Postal Telegraph-Cable Co.

PHILADELPHIA, PA., *October 24th*, 1896.

Horst Brothers, San Francisco.

I decline to receive shipment of hops October ninth. Particulars by mail.

JOHN ROEHM."

12 " PHILADELPHIA, *October* 24, 1896.

Messrs. Horst Brothers, No. 220 California St., San Francisco, California.

GENTLEMEN: Yours of October 9th enclosing bill of lading and bill of particulars for 20 bales of hops, forwarded me under the terms of contract of August 25th, 1893, was received and I have wired you that I decline to receive the same.

I notified you under date of June 27th, 1896, that owing to the dissolution of the copartnership with which I originally contracted, and the fact that this firm was no longer in existence, I considered my contract at an end and will make arrangements for purchasing my supplies elsewhere.

I am advised that I am under no obligation by that contract to accept supplies from you.

If you desire to bill these goods at the current market rates, under a new contract, I will accept them, if upon inspection they are of the quality desired, otherwise they will remain at the freight station subject to your order.

Very truly yours, JOHN ROEHM."

And on the same date his counsel sent to plaintiffs the following letter:

" Offices of R. O. Moon, attorney and counselor at law, 1530 Chestnut St.

PHILADELPHIA, *October* 24, 1896.

Paul R. G. Horst, Esq., 42 Pearl St., New York city.

DEAR SIR: I am instructed by my client, Mr. John Roehm, of this city, to notify you, in confirmation of his communication of June 27th, that, for reasons therein stated, he regards your contract with him to furnish hops of the crop of 1896 and 1897 annulled, and that he has made arrangements to purchase his stock from other parties.

I have advised him, upon an examination of all the facts surrounding this case, that he has a right to terminate this contract.

Very truly yours, R. O. MOON."

13 Defendant has never withdrawn the said refusal, and has refused to receive the shipment of hops by plaintiffs under said contracts, as aforesaid, or any hops thereunder.

The market price in New York city on October 24th, 1896, of prime Pacific Coast hops of the crop of 1896, of the kind, character and quality specified in the contracts for hops of that year, and deliverable as therein specified, was seven and one-half cents per pound, and the market price in New York city on October 24th, 1896, of prime Pacific Coast hops of the crop of 1897, of the kind, character and quality specified in the above contracts for hops of that year and deliverable as therein specified, was nine and one-half cents per pound. The average number of pounds in a bale of hops of the kind, character and quality specified in said contracts, according to the usual practice and custom of merchants dealing in such articles, both at the date of said contracts and on October 24th, 1896, was one hundred and ninety-six pounds net, after deducting the three and one-half pounds tare specified in said contracts.

Plaintiffs have, therefore, suffered a loss by defendant's breach of the above contract as follows:

First. A sum equal to the difference between twenty-two cents and seven and one-half cents per pound on 39,200 pounds of hops of the crop of 1896, to wit, the sum of five thousand six hundred and eighty-four dollars.

Second. A sum equal to the difference between twenty-two cents and nine and one-half cents per pound on 39,200 pounds of hops of the crop of 1897, to wit, the sum of four thousand nine hundred dollars.

Third. A sum equal to interest at six per cent. on the aggregate of the above sums, to wit, ten thousand five hundred and eighty-four dollars from October 24th, 1896, to the date of entry of judgment in this case.

Plaintiffs therefore claim from defendant the said sum of ten thousand five hundred and eighty-four dollars, with interest from October 24th, 1896, which sum plaintiffs aver is justly due and owing to them by defendant.

JOHN A. GA-VER.
FRANK P. PRICHARD.

STATE OF NEW YORK, }
County and City of New York, } ss:

E. L. Brown being duly sworn says: I am the agent for plaintiffs in New York city. One of the plaintiffs is at present in London and the other is in San Francisco. I make this affidavit on
14 their behalf. The matters alleged in the foregoing statement of claim, as the basis of the plaintiffs' demand in the above case, are true to the best of my knowledge and belief

E. L. BROWN.

Sworn and subscribed to before me this 21st day of January, A. D. 1897.

VICTOR CUMBERSON,
Notary Public, Kings County.

[SEAL.]

Certificate filed in N. Y. Co.

Endorsed: No. —. U. S. C. C., E. D. of Pa., October session, 1896. Horst Bros. *et al. vs.* John Roehm. Copy plaintiff's statement. Filed January 23, 1897. Samuel Bell, clerk. John A. Garver, Frank P. Prichard.

PAUL R. G. HORST ET AL., to Use, etc., *vs.* JOHN ROEHM. } C. C. U. S., E. D. of Pa., Oct. Sess., 1896. No. 42.

Please enter my appearance for the defendant.

R. O. MOON,
Attorney for Defendant.

February 9, 1897.

Samuel Bell, Esq., clerk U. S. C. C.

Endorsed: 42. October sess., 1896, U. S. C. C., E. D. of Pa. Horst *vs.* Roehm. Appearance. Filed Feb. 10, 1897. Samuel Bell, clerk. R. O. Moon, att'y for def't.

15 PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,

vs.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania. } U. S. C. C., E. D. of Pa., October Sess., 1896. No. 42.

CITY OF PHILADELPHIA, *ss.*:

John Roehm, the defendant, being duly sworn, deposes and says, that he has a just and legal defence to the plaintiffs' claim of the following nature and character:

First. Deponent is advised that the four agreements made between plaintiffs and himself, all dated August 25, 1893, the first two providing for the sale and delivery by plaintiffs to himself of two hundred bales of prime Pacific Coast hops of the crop of the year 1896, deliverable at the rate of 20 bales each month from October, 1896, to July, in the year 1897, and the other two providing for the delivery of two hundred bales of the crop of the year 1897, at the rate of 20 bales each month from October, 1897, to July, in the year 1898, at the stipulated price of 22 cents per pound, are void at law as being mere gambling contracts or wagers on the prices of hops per pound at a period of four years subsequent thereto and in relation to things not in existence at the date of the said contracts, or the natural product or expected increase of hops sown and already belonging to the plaintiffs, or over the sowing and reaping of which four years after the date of the said contracts the plaintiffs not being

growers thereof, had no possible control, and could by no contract make certain to deponent their ability to make the deliveries in the year 1896 and 1897, as stipulated.

Second. Deponent says that on the 23d day of June, A. D. 1896, the firm of Horst Brothers, with whom he contracted was dissolved and notice of the same was given to deponent and that in consequence of said dissolution and withdrawal from business of the said plaintiffs' firm, they were unable to further carry out their contract with deponent, and that since that time the said firm of Horst Brothers, has never tendered to deponent any hops in conformity with the requirements of the said contract. Subsequent to
16 the said 23d day of June, a new copartnership was formed by and between E. Clemens Horst and Louis A. Horst, and the hops tendered deponent as set out in plaintiffs' statement of claim were tendered by the second new firm, and not the firm or copartnership with which deponent contracted, and he consequently declined and refused to accept the same, and gave plaintiffs notice of his reasons therefor.

Deponent further says that the said Paul R. G. Horst, who was the senior member of the firm of Horst Brothers, with whom he contracted is not a member of the new firm so formed, but is engaged in business for himself, and deponent further says that it was on account of the special knowledge and experience of the said senior member of the firm of Horst Brothers, to wit, the said Paul R. G. Horst, and his information and skill in selecting goods suited to de*de*fendant's business that he was induced to enter into the contract. Deponent himself although using hops extensively in his business has no considerable knowledge of their quality and relied upon the expert knowledge of the said Paul R. G. Horst, who has since engaged in business as a rival to the said dissolved firm of Horst Brothers, and deponent therefore says that by the dissolution of the firm with which he entered into said contract and the attempt to force upon him the goods furnished by another and different firm he is deprived of the substantial advantage of the judgment and experience of the senior member of the copartnership with which he contracted and was the chief cause that led him into the said contract.

Third. Deponent further says that he is advised if he is liable at all (which he denies), he is liable only for the difference in the price for the said 20 bales tendered as stipulated in his contract with Horst Brothers, to wit, the sum of twenty-two cents per pound and the present market value of the same goods; which the deponent avers is from thirteen to fifteen cents per pound instead of seven and one-half cents as alleged in plaintiffs' statement of claim.

Fourth. Deponent further says that according to the terms of the contract upon which plaintiffs base this action one hundred bales of the said hops were not to be delivered to and received by deponent until the month of April, May, June, and July of 1897; and two hundred bales of the same being of the crop of 1897, was not to be finally delivered until the month of July, 1898, are not in existence

and have no recognized standard of value or market price in New York, or elsewhere.

Deponent therefore avers that plaintiffs cannot recover damages as alleged in their statement of claim because no hops other than the twenty bales referred to have ever been tendered him by any parties; and that even if deponent were to continue to refuse future shipments as provided for in said contract (which he may or may not do), the plaintiffs even if they were entitled to recover at
17 all may suffer no damage as the value of the said hops at the time of delivery may be in excess of the price stipulated in said contract.

All of which deponent verily believes and expects to be able to prove on the trial of the cause.

JOHN ROEHM.

COUNTY OF PHILADELPHIA, *ss:*

John Roehm, being duly sworn according to law, doth depose and say, that the facts contained in the foregoing statement are true, to the best of his information, knowledge and belief.

JOHN ROEHM.

Sworn and subscribed before me this 9th day of February, 1897.

LEO BELMONT,
Notary Public.

Endorsed: 42. October sessions, 1896, circuit court of the United States, eastern district of Penna. Paul R. G. Horst *et al.*, to use, etc., *vs.* John Roehm. Affidavit of defence. Filed Feb. 10, 1897. Samuel Bell, clerk. R. O. Moon, att'y for defendant.

PAUL R. G. HORST ET AL., to Use, etc., *vs.* JOHN ROEHM. } U. S. C. C., E. D. of Pa., October Sessions, 1896. No. 42.

SIR: Enter rule on the above-named defendant to plead within fifteen days or judgment *sec. leg.*

FRANK P. PRICHARD,
JOHN A. GARVER,
Per T. S. GATES,
Attorneys for Plaintiffs.

To clerk U. S. C. C., eastern district Penna.

February 12, 1897.

Endorsed: 42. October sessions, 1896, U. S. C. C., E. D. of Pa. Paul R. G. Horst *et al.*, to use, etc, *vs.* John Roehm. Rule to plead. Filed Feb. 12, 1897. Samuel Bell, clerk, per M. Garver, Prichard.

18 PAUL R. G. HORST ET AL., to Use, etc., *vs.* JOHN ROEHM. } C. C. of U. S., E. D. of Pa., October Session, 1896. No. 42.

Defendant pleads non assumpsit.

R. O. MOON,
Attorney for Defendant.

February 24, 1897.

Col. BELL, clerk U. S. C. C.

Endorsed: No. 42. October session, 1896, circuit court U. S. E. D. of Pa. Paul R. G. Horst *et al.*, etc., *vs.* John Roehm. Plea. Filed Feb. 26, 1897. Samuel Bell, clerk, per M. R. O. Moon.

PAUL R. G. HORST ET AL., to the Use, etc., *vs.* JOHN ROEHM. } U. S. C. C., E. D. of Pa., October Sessions, 1896. No. 42.

The plaintiff replies similiter and issue.

JOHN A. GARVER,
FRANK P. PRICHARD,
Per T. S. G., *Attorneys for Plaintiffs.*

To clerk U. S. C. C., E. D. of Pa.

March 5, 1897.

Endorsed: 42. October session, 1896, U. S. C. C., E. D. of Pa. Horst *et al. vs.* Roehm. Replication. Filed March 5, 1897. Samuel Bell, clerk, per M. Garver, Prichard.

19 PAUL R. G. HORST ET AL. *vs.* JOHN ROEHM. } U. S. C. C., October Session, 1896. No. 42.

It is hereby stipulated and agreed that the jury is waived in the above case, and that the issue therein raised may be tried and determined by the court without the intervention of a jury.

FRANK P. PRICHARD,
Attorney for Plaintiff.
R. O. MOON,
Attorney for Defendant.

Philadelphia, October 28, 1897.

Endorsed: No. 42. October sess., 1896, U. S. C. C., E. D. of Pa. Paul R. G. Horst *et al. vs.* John Roehm. Stipulation of counsel waiving trial by jury and submitting issue to trial by court. Filed Nov. 3, 1897. Samuel Bell, clerk, per M.

And afterwards, to wit, on the thirtieth day of December, in the year of our Lord one thousand eight hundred and ninety-seven came the parties aforesaid by their counsel aforesaid, and this cause being called for trial by the court and the evidence having been submitted and argument having been made by counsel for the re-

spective parties the court not being fully advised in the premises take further time for the consideration thereof.

And afterwards, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand eight hundred and ninety-seven came the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises orders judgment to be entered in favor of the plaintiffs and against the defendant in the sum of ten thousand one hundred and eighteen $\frac{30}{100}$ dollars, in the following opinion, to wit:

In the Circuit Court of the United States for the Third Circuit, October Sessions, 1896.

HORST BROTHERS ET AL. *vs.* JOHN ROEHM. } No. 42.

In pursuance of stipulation filed under section 649 of the Revised Statutes, this case has been tried by the court, without the intervention of a jury.

20 *Finding of Facts.*

On August 25th, 1893, the firm of Horst Brothers, composed of Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, the legal plaintiffs, entered into four written contracts with John Roehm, the defendant, of which the following are copies:

"*Hop Contract.*

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment, 20 bales each month, March, April, May, June and July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part,

other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

In witness whereof, the said parties have hereunto set their hands, Phila., this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM."

"*Hop Contract.*

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific
21 Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment, 20 bales each month, October, November, December, January, and February, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

In witness whereof, the said parties have hereunto set their hands, Phila., this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM."

"*Hop Contract.*

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store

New York city and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment, 20 bales each month, March, April, May, June and July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the
22 first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree- to receive same.

In witness whereof, the said parties have hereunto set their hands, Phila., this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM."

"*Hop Contract.*

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree- to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store, New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment, 20 bales each month, October, November, December, January, and February, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree- to receive same.

In witness whereof, the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM."

The months named in each of these contracts respectively, as "time of shipment," must, under the custom of the trade, be understood as meaning the month so named, which would follow next after the summer months of the year of the crop referred to in the particular contract.

23 On June 23d, 1896, the firm of Horst Brothers was dissolved, and Paul R. G. Horst assigned to his copartners, E. Clemens Horst and Louis A. Horst, the use plaintiffs, all the interest of him, the said Paul R. G. Horst in the said contracts.

Upon June 23d, 1896, a notice, of which the following is a copy, was addressed to and received by the defendant:

"JUNE 23, 1896.

DEAR SIR: We beg to inform you that the partnership of Horst Brothers has been this day dissolved.

Respectfully yours, HORST BROTHERS."

To this, under date of June 27th, 1896, the defendant replied, saying: * * * "I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, * * * which, of course, you cannot fulfill. I therefore consider the contracts annulled and will make other arrangements for the purchase of the hops I may need, and you may consider this as release from liability on your part to comply with the contracts." In answer to this, Horst Bros. in liquidation addressed a letter to the defendant, which he duly received, in which it was said that he had misconstrued the notice of dissolution sent out to the trade; that its meaning was that no new contracts would be made and no new business undertaken by the firm of Horst Bros.; and in which it was further stated that, "so far as the firm or business is concerned, the firm will discharge its obligations and will try to collect its claims; it does not ask for any release or discharge, and will punctually live up to all the contracts which it has made with you." This communication was not replied to.

In October, 1896, the first shipment of twenty bales of hops under the contracts was made, and the invoice and bill of lading covering that shipment were sent to the defendant, who, on October 24th, 1896, by telegram and letter, acknowledged receipt of the bill of lading and bill of particulars, but, upon the ground set up in his letter of June 27th, 1896, declined to receive the hops.

At the time of the defendant's refusal to receive the shipment above mentioned, the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of nine cents per pound for "prime Pacific Coast hops of the crop of 1896," and of eleven cents per pound for like hops of the crop of 1897; and the difference between the prices fixed by the con-

24 tracts sued on and these above stated, together with interest on the sum of such differences, from October 24, 1896, to this date, are as follows:

Difference between contract price, 22 cents per pound, and 9 cents per pound, on 200 bales, 39,200 pounds, (a) 13 cents per pound.....	$5,096 00
Difference between contract price, 22 cents per pound, and 11 cents per pound, on 200 bales, 39,200 pounds, (a) 11 cents per pound.....	4,312 00
	$9,408 00
Interest from October 24th, 1896, to January 27th, 1896.	710 30
	$10,118 30

Opinion.

1. The position taken by the defendant in his letter of June 27, 1896, and again upon the trial, is untenable. His contracts with Horst Bros. were not annulled by the dissolution of that firm, nor by the assignment of one of the partner's interest therein to his co-partners. To hold otherwise it would be necessary to maintain that any dissolution of a commercial partnership accompanied by a division of its executory contracts, would work their extinguishment, and the statement of such a proposition is, I think, its sufficient refutation. Of course, the other contracting party may, notwithstanding dissolution and regardless of the terms thereof, hold all the partners upon a partnership contract; and, on the other hand, the contractual rights of the latter continue to be enforceable, though only by action (as in this instance) in the name of all to the use of such of them as, by agreement amongst themselves, may be entitled to the proceeds of recovery. The judgment in National Bank *vs.* Hall (101 U. S., 43) is not opposed to this view of the law. The conclusion there reached was based, primarily and mainly, upon the actual non-existence of an asserted contract, and what, at the close of the opinion, was said respecting "the change of the firm," who, "if in fact, there were * * * a contract" had been one of the parties to it, was unnecessary to the decision. But, aside from this, the facts of that case distinguish it from the present one, and the later decisions of the same court, hereafter cited, require that it shall be distinguished. Without pausing to point out the details of dissimilarity, it will suffice to observe that in the case referred to, the substance of the ruling was that a new party could not be imported into the contract there asserted, whereas in the case now under consideration, as already said, the parties are still, both as to liability and right, precisely the same as those by whom the contract was originally made. "Rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confi-
25 dence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." This statement of the law was adopted by the Supreme Court in Arkansas Company *vs.* Balden Company, 127 U. S., 379. No statement more favorable to the defendant could be made; but the rule it embodies cannot avail him.

The liability of all the members of the plaintiff firm continue after dissolution to be precisely what it had been before; and there is nothing whatever in the contracts to indicate that they "involve a relation of personal confidence" between the defendant and Paul R. G. Horst, the person who assigned to his copartners. It was on the allegation that such confidence existed in fact, that the defendant based his defence upon this point; and in support of this allegation the defendant testified, in general terms, to the effect that he had been influenced, or perhaps induced, to contract with the plaintiffs, by his reliance upon the judgment and fair dealing of Paul R. G. Horst; but the admission of this testimony was duly objected to by plaintiffs' counsel, and was received subject to that objection and with reservation of judgment upon it. I have no doubt that it was irrelevant; and, consequently, I have excluded it from consideration and have made no finding of fact with reference to it. As already indicated, I am of the opinion that "personal confidence" to preclude the transfer of rights arising out of contract must be involved in the nature of the rights themselves, so that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. If from the nature of the subject, personal confidence be not implied, the fact, if conceded, that the personal participation of one of several contractors in carrying out the contract had been actually relied upon would be of no consequence whatever. Delaware County *vs.* Diebold Co., 133 U. S., 473–488.

2. This case is within the rule laid down in Hochster *vs.* De la Tour, 2 El. & Bl., 678, and the other English cases cited in Dingley *vs.* Oler, 117 U. S., 502. In the case last mentioned the Supreme Court, after remarking that the rule referred to had been followed by the courts of several of the States, but had been denied by the supreme judicial court of Massachusetts, declined to decide whether or not it should be maintained "as applicable to the class of cases" to which the one then before it belonged. The facts of that case were somewhat peculiar, and it is not quite clear that the court's declination to pass upon the applicability of the doctrine of Hochster *vs.* De la Tour, to it implied a doubt as to the propriety of its application in a case so plainly within that doctrine as is that now presented. But, assuming the broad question to have been left open by the Supreme Court, I think that upon the preponderance of authority, as well as upon sound reasoning, it must be held that a right of action had accrued to the plaintiffs, with respect to all the
26 contracts in question, at the time this suit was brought. There can be no doubt that this would be so under the law of England, and a diversity in the law, as administered on the two sides of the Atlantic, concerning the consequence to result from an absolute repudiation by one party of a commercial contract of this kind, is greatly to be deprecated. Norrington *vs.* Wright, 115 U. S., 206.

In my opinion the argument of the court in Daniels *vs.* Newton, 114 Mass., 530, was well and sufficiently answered by Judge Lowell, in Dingley *vs.* Oler (11 Fed., 372). What is there said need not be

repeated at length; but I may remark that I concur with that learned judge in thinking that the several State decisions cited by him (to which others might be added) as in conflict with Daniels *vs.* Newton, are "founded in good sense, and rest on strong grounds of convenience, however difficult it may be to reconcile them with the strictest logic."

Since the decision of Dingley *vs.* Oler the circuit court of appeals for the sixth circuit has, in two cases (in both of which Dingley *vs.* Oler was cited), stated the law to be that "where a contracting party gives notice of his intention not to comply with the obligation of his contract, the other party may accept this as an anticipatory breach of the contract, and sue for damages without waiting until the time mentioned for the completion and fulfillment of the contract by its terms * * *" Brewing Co. *vs.* Bullock, 59 Fed., 87; Lumber Co. *vs.* Alley, 43 U. S. App., 175. In the absence of any controlling solution of the question by the Supreme Court, I do not hesitate to adopt this statement, supported, as it is, by the judgment of Judge Lowell, in Dingley *vs.* Oler, as well as by the English authorities, and by the judgments of the courts of several of the States.

3. On behalf of the defendant it has been contended that "assuming that the action can be maintained the measure of damages must be restricted to the loss, if any, upon the deliveries which should have been made prior to the bringing of the suit." I cannot yield assent to this proposition. It conflicts with the principle that the measure of damages in every case must be such as, when applied, will result in ascertainment of the sum necessary to make good the entire loss sustained by reason of the act or default which constitutes the cause of action. The plaintiffs were, by the act of the defendant, prevented from making the deliveries called for by the contracts. It is this anticipatory denial and obstruction of the right to deliver, not a tender and refusal, which is the ground of suit; and, the measure which might otherwise have been applicable is, therefore, wholly inappropriate. The law of damages is not comprised in a set of arbitrary rules. Where a contract has been broken, or a wrong has been committed, compensation must be made. This is the underlying principle, and any standard or measure
27 which does not accord with it cannot be applied, but some other, which is fairly compensatory to the one party, and not unjust to the other, must be resorted to. Carroll-Porter Co. *vs.* Columbus Co., 3 U. S. App., 633. In this case the plaintiffs have shown that they could have made subcontracts for the delivery of the hops, according to their contracts with the defendant; and whatever might be the rule in a case in which this could not be shown, I am of opinion that, where, as in this instance, that fact appears, the difference between the price at which such subcontracts could have been obtained and the price named in the contracts between the parties, is manifestly the amount of the loss actually suffered, and, therefore, must be the correct measure of the damages recoverable. Hinckley *vs.* Pittsburg Co., 121 U. S., 264; Anvil Co. *vs.* Humble, 153 U. S., 549.

There was some variance in the evidence respecting the price at which subcontracts could have been obtained. The evidence on behalf of the plaintiff was that, on October 24, 1896, the price for the crop of 1896 would have been seven and one-half cents per pound, and for the crop of 1897, nine and one-half cents per pound. But the evidence for the defendant tended to show, as to each crop, that the price would have been greater. In my findings of fact I have not accepted the extreme position of either side. I do not think I would have been justified in relying wholly upon any part of the evidence, and my conclusion was arrived at after carefully considering the whole of it, and giving to every portion the weight to which I believe it to be entitled. I have had in mind the right of the plaintiffs to compensation, but have also been especially solicitous to avoid doing injustice to the defendant.

Judgment.

It is ordered that judgment be entered, as of this date, in favor of the plaintiffs and against the defendant, in the sum of $10,118.30.

GEO. M. DALLAS, *Judge.*

January 27, 1898.

28 PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of Illinois,

vs.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.

U. S. C. C., October Sess., 1896. No. 42.

Motion for New Trial and Reasons Therefor.

And now, to wit, this first day of February, A. D. 1898, comes the defendant, by his counsel, R. O. Moon and Samuel Dickson, Esqrs., and moves the court for a new trial, assigning therefor the following reasons:

1. The judgment was against the evidence.
2. The judgment was against the weight of the evidence.
3. The judgment was against the law.
4. The learned judge erred in finding as a matter of fact that "at the time of the defendant's refusal to receive the shipment above mentioned (to wit, October 24, 1896), the plaintiffs could have made subcontracts for forward delivery according to the contracts in suit, at the price of nine cents per pound for "prime Pacific Coast hops of the crop of 1896, and of eleven cents per pound for like hops of the crop of 1897."
5. The learned judge erred in finding *inter alia* as a matter of law

that "the position taken by the defendant in his letter of June 27, 1896, and again upon the trial (to wit, that the dissolution of the plaintiff firm annulled his contract with the said firm) is untenable. His contracts with Horst Bros. were not annulled by the dissolution of that firm, nor by the assignment of one of the partners' interest therein to his copartners."

6. The learned judge erred in finding *inter alia* as a matter of law that "there is nothing whatever in the contracts to indicate that they involve a relation of personal confidence between the defendant and Paul R. G. Horst, the person who assigned to his copartners."

7. The learned judge erred in excluding from consideration the testimony going to show the defendant's reliance upon the judgment and fitness of Paul R. G. Horst, and that he contracted with the plaintiffs in consequence thereof.

29 8. The learned judge erred in finding *inter alia* as a matter of law that "personal confidence to preclude the transfer of rights arising out of contract must be involved in the nature of the rights themselves, so that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. If from the nature of the subject, personal confidence be not implied, the fact, if conceded, that the personal participation of one of several contractors in carrying out the contract had been actually relied upon would be of no consequence whatever."

9. The learned judge erred in finding *inter alia* as a matter of law that "a right of action had accrued to the plaintiffs, with respect to all the contracts in question, at the time this suit was brought."

10. The learned judge erred in finding *inter alia* as a matter of law that "in this case the plaintiffs have shown that they could have made subcontracts for the delivery of the hops, according to their contracts with the defendant; and whatever might be the rule in a case in which this could not be shown, I am of opinion that, where, as in this instance, that fact appears, the difference between the price at which such subcontracts could have been obtained and the price named in the contracts between the parties, is manifestly the amount of the loss actually suffered, and, therefore, must be the correct measure of the damages recoverable."

11. The learned judge erred in ordering that judgment be entered as of January 27, 1898, in favor of the plaintiffs and against the defendant, in the sum of $10,118.30.

SAMUEL DICKSON,
R. O. MOON,
Attorneys for Defendants.

Endorsed: In the circuit court of the U. S., E. D. of Penna. No. 43. October sessions, 1896. Paul R. G. Horst, etc., late trading, etc., to use, etc., *vs.* John Roehm. Motion for new trial and reasons. Filed Feb. 1, 1898. Samuel Bell, clerk. Moon, Dickson.

And afterwards, to wit, on the twenty-third day of February, in the year of our Lord one thousand eight hundred and ninety-eight, came the parties aforesaid by their counsel aforesaid, and the cause being called for argument on defendant's motion for a new trial, and having been argued by counsel for the respective parties, and the court being not fully advised in the premises takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and ninety-eight, came the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to wit:

In the Circuit Court of the United States, Eastern District of Pennsylvania, October Sessions, 1896.

HORST BROS. *vs.* ROEHM. } No. 42.

The learned counsel of the defendant have confined their argument in support of his rule for a new trial to the subject of damages. They have contended that the court erred with respect to the measure applied, and also in its finding of the amount recoverable in accordance with that measure; but I have not been convinced that a mistake was made on either point. I am still of opinion that the plaintiffs' right to compensation accrued at the time of the defendant's anticipatory breach of the several contracts, which were treated by the court, and correctly I think, as constituting a single one. The defendant's act, in repudiating them, gave to the plaintiffs a then present cause of action, and imposed — the defendant an immediate liability with respect to the entire transaction. At that time, as heretofore found, the plaintiffs could have made subcontracts according to their contracts with the defendant, and therefore the difference between the price at which such subcontracts could then have been obtained and the price named in the contracts in suit was the measure by which the sum which the defendant should be required to pay was to be ascertained. In accordance with this view the damages were assessed, and, as they were due and payable as of the date of breach, interest from that date was properly included; and any possible advantage which the plaintiffs may be conjectured to have acquired by reason of the defendant having, by his own conduct, established a premature time of liquidation was rightly not considered.

Upon an attentive review of the evidence, I perceive no reason for disturbing the finding originally made as to the prices at which subcontracts could have been obtained.

The defendant's rule for a new trial is discharged.

GEO. M. DALLAS, *J.*

February 25, 1898.

Endorsed: No. 42. Oct. sess., 1896, U. S. C. C., E. D. of Pa. Horst Bros. *vs.* Roehm. Opinion dismissing rule for new trial. Filed Feb. 25, 1898. Samuel Bell, clerk, per R.

And afterwards, to wit, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and ninety-eight, judgment is entered in favor of the plaintiff and against the defendant for ten thousand one hundred and eighteen $\frac{10}{100}$ dollars.

31 PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of Illinois,	U. S. C. C., October Sess., 1896. No. 42.
vs.	
JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.	

Be it remembered, that in the said sessions of October, 1896, came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of assumpsit, etc., in which the said plaintiff declared (*pro ut narr.*) and the said defendant pleaded (*pro ut* pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of the said court held at the district aforesaid, before the Honorable George M. Dallas, judge of the said court, the 13th and 14th days of December, 1897, the aforesaid issue between the said parties came to be tried by the said judge, under an agreement and stipulation, filed of record (*pro ut* the same), at which day came as well the said plaintiffs as the said defendant, by their respective attorneys; and upon the trial the counsel of the said plaintiffs and of the said defendant did offer testimony as follows, to wit:

Counsel for plaintiff offers in evidence four memoranda of agreement, signed by plaintiff and defendant, all dated August 25, 1893, one for the sale and delivery of one hundred bales prime Pacific hops of the crop of 1896, to be shipped twenty bales each month, in the months of March, April, May, June and July.

Another, for one hundred bales similar hops of the crop of 1896, deliverable twenty bales each month in October, November, December, January and February.

Another, for one hundred bales similar hops, crop of 1897, deliverable twenty bales each month in the months of March, April, May, June and July.

Another, for one hundred bales similar hops, crop of 1897, deliverable twenty bales each month in the months of October, November, December, January, and February.

The price named in all these memoranda is twenty-two cents per pound.

Said memoranda are as follows:

32 *Hop Contract.*

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the par*ties* of the second part, and that the par*ties* of the second part agree to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment 20 bales each month, March, April, May, June and July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the par*ties* of the second part, other hops, in fulfillment of this agreement, and par*ties* of the second part agree to receive same.

In witness whereof, the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the par*ties* of the second part, and that the par*ties* of the second part agree to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1896. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

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If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of

their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree- to receive same.

In witness whereof, the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, party of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree- to purchase, pay for, and receive from the party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time of shipment 20 bales each month, March, April, May, June and July, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision,
submit samples or tender delivery to the parties of the second
34 part, other hops, in fulfillment of this agreement, and parties of the second part agree- to receive same.

In witness whereof, the said parties have hereunto set their hands, Phila lelphia, this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM.

Hop Contract.

Memorandum of agreement made and entered into by and between Horst Brothers, doing business in the city of New York, parties of the first part, and John Roehm, parties of the second part.

Witnesseth: That the said parties of the first part agree to sell and deliver to the parties of the second part, and that the parties of the second part agree- to purchase, pay for, and receive from the

party of the first part one hundred (100) bales, prime Pacific Coast hops of the crop of 1897. Three and one-half pounds tare to be deducted on each bale. Said hops to be delivered ex dock or store New York city, and to be paid for in net cash ten days from date of arrival at the rate of twenty-two (22) cents per pound.

Time for shipment 20 bales each month, October, November, December, January and February, except as hereafter provided.

If at any time a difference of opinion shall exist regarding the quality or condition of any hops submitted or tendered under this agreement, each party shall select an arbitrator, to whom the question of the quality and condition shall be submitted, and in case of their disagreement, a third arbitrator shall be selected by the two thus chosen, and the decision of the majority of the three shall be final; and in case the decision shall be that the hops tendered are not equal to the quality above called for, the parties of the first part shall, within 30 days after receipt of written notice of such decision, submit samples or tender delivery to the parties of the second part, other hops, in fulfillment of this agreement, and parties of the second part agree to receive same.

In witness whereof, the said parties have hereunto set their hands, Philadelphia, this 25th day of August, 1893.

HORST BROS.
JOHN ROEHM.

Counsel for plaintiff calls for production of letter Horst Bros. to John Roehm, dated June 23, 1896. Same produced, as follows:

"JUNE 23, 1896.

DEAR SIR: We beg to inform you that the partnership of Horst Bros. has been this day dissolved.

Respectfully yours, HORST BROS."

35 Counsel for plaintiff also reads in evidence letter dated Sacramento, California, June 24, 1896, which will be found at close of testimony.

Also letter from defendant to plaintiff, in reply to said letter, as follows:

"JUNE 27, 1896.

Messrs. Horst Brothers, 42 Pearl St., New York city.

DEAR SIR: Yours of the 23d inst., notifying me of the dissolution of the copartnership of Horst Bros. is received. I suppose that your reason for giving me the notice is on account of the contracts which I had with your late firm, for the furnishing to me of 200 bales of prime Pacific Coast hops of the crop of 1896, and 200 bales of prime Pacific hops of the crop of 1897, which of course you cannot fulfill. I therefore consider the contracts as annulled and will make other arrangements for the purchase of the hops that I may need, and you may consider this as release from liability, on your part, to comply with the contracts.

Yours truly, JOHN ROEHM."

Counsel for plaintiff- calls for letter dated July 3, 1896, Horst Bros. to Roehm, same produced as follows:

"NEW YORK, *July* 3, 1896.

Mr. John Roehm, 856 Charlotte St., Phila., Pa.

DEAR SIR: In answer to yours of the 27th ultimo, we beg to say, that you have misconstrued the meaning of the notice of dissolution sent out by us to the trade. Its meaning was simply that no new contracts would be made and no new business undertaken by the firm of Horst Brothers. So far as the firm or business is concerned, the firm will discharge its obligations and will try to collect its claim; it does not ask for any release or discharges, and will punctually live up to all the contracts which it has made with you.

Yours respectfully, HORST BROS.,
In Liquidation."

Counsel for plaintiff- also reads in evidence the following letter:

"SAN FRANCISCO, *Sept.* 3, 1896.

Mr. John Roehm (brewer), Philadelphia, Pa.

GENTLEMEN: We refer you to your hop contract dated August 25, 1893. Mr. Paul Horst, who, with the members of the present firm of Horst Bros., comprised the former firm of the same
36 name, has assigned in writing to the present firm of Horst Bros., all his interests in the above-named contracts, and Mr. Paul Horst, aside from his liability to you for the proper performance of the contracts on our part, is no longer interested in the same, you will please therefore address to this our San Francisco office, any correspondence and wishes you may have relative to the same.

We assure you that the deliveries will be punctually and properly made and we will make every effort to please you in all matters pertaining to the same.

Wishing at all times to be at your service, we are, gentlemen,
Very truly yours, HORST BROS."

Counsel for plaintiff- also reads in evidence the following letter:

"SAN FRANCISCO, *Sept. 4th*, 1896.

Mr. John Roehm, Philadelphia, Pa.

DEAR SIR: Will you please write us whether you wish us to ship the hops under your contract direct to your city. The contract calls for delivery at New York, and, as we ship direct from this coast, we can ship to either city for same rate. Consequently, there will be a saving to you in freight if we ship to your city direct from here.

Awaiting your reply, we are,
Very truly, HORST BROS."

Counsel for plaintiff- also reads in evidence the following letter:

"PHILADELPHIA, *Sept. 14th*, 1896.

Messrs. Horst Brothers, San Francisco, California.

DEAR SIRS: In response to your letters dated 3d and 4th inst.,

state that before shipping me any hops always send me samples from which I can select lots, the same as you have been doing in the past.

Very truly, JOHN ROEHM."

Counsel for plaintiff also reads in evidence the following letter:

37 "The Western Union Telegraph Company.

SAN FRANCISCO, *Sept.* 21*st*, 1896.

Jno. Roehm, 856 Charlotte St., Phila.:

Referring your letter fourteenth answering ours fourth—please wire our expense of what style hops you wish samples, also whether we shall make deliveries Philadelphia instead of New York.

HORST BROS."

Also letter dated September 21, 1896, affirming same.

Also, letter dated October 9, 1896, Horst Bros. to Roehm, as follows:

"SAN FRANCISCO, *Sept.* 21, 1896.

Mr. John Roehm, Philadelphia, Pa.

DEAR SIR: We acknowledge receipt of your favor of Sept. 14th, and answered today by telegram as follows:

'Referring your letter fourteenth answering our fourth—please wire, our expense, of what style hops you wish samples—also whether we shall make deliveries Philadelphia instead of New York.'

We confirm the above.

Very truly, HORST BROS."

"SAN FRANCISCO, *October* 9, 1896.

Mr. John Roehm.

DEAR SIR: We enclose you herewith invoice and B L covering shipment of 20 bales sold for October shipment under your contract dated August 25th, 1893.

We will thank you to place the amount of invoice, $802.76, to our credit.

You will notice that the shipment is made to New York and that the railroad company will deliver the hops at New York subject to your order. We wrote you on September 4th and wired and wrote you on September 21st, asking you whether we might make the shipment to you at Philadelphia instead of New York, free of expense, but we received no reply from you thereto; therefore, we have made the shipment to New York as per contract, and you will please give the railroad company any further instructions regarding the hops.

We have made you a very fine shipment and we know that you will be very much pleased with the quality of the same.

Very truly, HORST BROS."

38 Also, telegram, defendant to plaintiff, dated October 24, 1896, as follows:

"Horst Brothers, San Francisco:

I decline to receive shipment hops October 9th. Particulars by mail."

Also, letter, defendant to plaintiff-, dated October 24, 1896, as follows:

PHILADELPHIA, *October* 24, 1896.

Messrs. Horst Bros., 220 California St., San Francisco, Cal.

GENTLEMEN: Yours of October 9th enclosing bill of lading and bill of particulars for twenty bales of hops, forwarded me under the terms of contract of August 25, 1893, was received and I have wired you that I decline to receive the same.

I notified you under date of June 27, 1896, that owing to the dissolution of the copartnership with which I originally contracted and the fact that this firm was no longer in existence, I considered my contract at an end, and will make arrangements for purchasing my supplies elsewhere.

I am advised that I am under no obligation by that contract to accept supplies from you.

If you desire to bill these goods at the current market rates, under a new contract, I will accept them, if upon inspection they are of the quality desired, otherwise they will remain at the freight station subject to your order.

Very truly yours, JOHN ROEHM."

Also letter dated October 31st, 1896, from R. O. Moon, counsel, as follows:

"OCTOBER 31, 1896.

Messrs. Horst Brothers, 122 Battery St., San Francisco, Cal.

GENTLEMEN: Your favor of October 23d, addressed to Mr. John Roehm, of this city, enclosing communication of Paul R. Horst, was this day handed to me by Mr. Roehm.

I have advised Mr. Roehm upon all the facts of this case; that his contract with you ceased to be binding upon him at the
39 time of dissolution of the copartnership with which he contracted, and acting under my advice he has declined to accept the consignment of hops recently forwarded by you.

Very truly yours, R. O. MOON."

Also, enclosed therein, letter dated New York, July 1, 1896, as follows:

"Mr. John Roehm, Philadelphia, Pa.

DEAR SIR: I have assigned to Louis A. Horst and E. Clemens Horst all my right and interest in the hop contracts made by Horst Brothers with your good selves and dated August 25th, 1893.

Very truly, PAUL R. G. HORST."

Also letter, R. O. Moon, dated October 24, 1896, to Paul R. Horst, New York city, as follows:

"OCTOBER 24TH, 1896.

Paul R. G. Horst, Esq., 42 Pearl St., New York city.

DEAR SIR: I am instructed by my client, Mr. John Roehm, of this city, to notify you, in confirmation of his communication of June 27th, that, for reasons therein stated, he regards your contract with him to furnish hops of the crop of 1896 and 1897 annulled, and that he has made arrangements to purchase his stock from other parties.

I have advised him, upon an examination of all the facts surrounding this case, that he has a right to terminate this contract.

Very truly yours, R. O. MOON."

Also letter, October 31st, R. O. Moon to Horst Brothers, San Francisco, as follows:

Messrs. Horst Bros., 122 Battery St., San Francisco, Cal.

GENTLEMEN: Your favor of October 23d, addressed to Mr. John Roehm, of this city, enclosing communication of Paul R. G. Horst, was this day handed to me by Mr. Roehm.

40 I have advised Mr. Roehm upon all the facts of this case; that his contract with you ceased to be binding upon him at the time of dissolution of the copartnership with which he contracted, and acting under my advice he has declined to accept the consignment of hops recently forwarded by you.

Very truly yours, R. O. MOON.

Also letter, F. P. Prichard to R. O. Moon, dated May 11th, 1897; letter November 5th, 1897, to Moon & Dickson, from F. P. Prichard, calling attention to said letter of May 11th, 1897; letter without date, addressed to F. P. Prichard, as follows:

"Replying to your notification of recent date in above matter that you had on hand certain hops ready for delivery, I write to say that under existing conditions Mr. Roehm must decline to receive them.

Very truly yours, R. O. MOON."

Counsel for plaintiff also offers and reads in evidence depositions of E. Clements Horst, T. B. Lovedale, Henry Gerber, Charles Schmidt, Rudolph Whittenbrock, H. Uchtmann, T. A. Livesly, and Kola Neis.

LORENZO D. JACKS, having been duly sworn on behalf of plaintiffs, was examined as follows:

By Mr. PRICHARD:

Q. What is your occupation?

A. I am a travelling man for Horst Bros., hop dealers—the firm that succeeded the plaintiffs in this case.

Q. Are you still in their employ?

A. Yes, sir.

Q. You have, I believe, sent in your resignation, and are about leaving their employ?

A. I have on account of ill health, but it has not yet been accepted.

Q. What has been your experience in buying and selling hops—how many years' experience have you had?

A. About five years.

Q. How large an experience have you had in that time; where have you bought and sold, and to what extent?

A. I have bought in New York State, and on the Pacific coast. I have sold all over the United States; that is, in every principal city in the United States.

41 Q. Have your sales been in large lots?

A. Yes.

Q. Can you give some idea of their aggregate extent per year?

A. I cannot, without looking over my books.

Q. They amount, I suppose, to many hundred bales, do they not?

A. Yes, to hundreds of bales.

Q. When would the crop of 1896, of the Pacific Coast crop of hops, be delivered under the ordinary usages of trade?

A. The crop is harvested on the Pacific coast about the last of August.

Q. In a contract made for the delivery of hops of the crop of 1896, where the articles are delivered in the months of October, November, December, January, and February, what months would those refer to?

A. If it was the 1896 crop it would be delivered in the same year, commencing October, 1896.

Q. In this case there are two contracts for the crop of 1896, one deliverable in the months of October, November, December, January, February, and the other in the months of March, April, May, June, and July, no year being stated. If it was the crop of 1896, and was harvested from August to October or November, then the delivery of those would be in the succeeding months?

A. Yes.

Q. That would make the months of October, November, December, January, and February, 1896 and 1897, and the months of March, April, May, June, and July, 1897?

A. Yes, sir.

Q. What was the market price of prime Pacific Coast hops of the crop of 1896, deliverable say in twenty-bale lots, commencing October, 1896, deliverable October, November, December, January, February, March, April, May, June, and July?

(Objected to, as to any testimony in this case after suit brought which was in December, 1896.)

The COURT: This case being tried without a jury the question will be reserved.

The WITNESS: About seven to seven and a half cents.

By Mr. PRICHARD:

Q. What would be the fair market price on October 24th, 1896, in New York city, for hops of the crop of 1897, or on a contract

for hops of the crop of 1897, to be deliverable in twenty-bale lots in ten successive months commencing October, 1897?

(Objected to.)

42 A. For prime Pacific Coast hops, about eight and a half cents.

Q. Please state whether or not it is a common and usual practice of the hop trade to sell hops for future delivery out of future crops.

A. Yes, a very common thing. I would like to change my answer made awhile ago. I stated seven and one-half cents. I did not count the freight. With that it would be about eight and a half.

By Mr. DIXON:

Q. When you answered as to the crop of 1896, and said that it was from seven to seven and one-half cents, you were then giving the San Francisco price?

A. I was giving seven and seven and a half the New York price in the year 1896, about October. That would be the market price for prime Pacific Coast hops in New York.

By Mr. PRICHARD:

Q. You have said that it was not unusual to make contracts for hops to be delivered in the future, out of future crops. Would a man experienced in the trade be able to quote prices, and is it a usual thing to quote prices to a purchaser who asks for such a contract?

(Objected to; the question should be, Is there a fixed market price?)

Mr. PRICHARD: I propose to show that it is an ordinary and usual thing for hop dealers to make contracts such as the contract in question here.

(To the witness:) You understood my question, did you not, in relation to the practice of making contracts for future delivery, to mean contracts which look to the actual delivery of the hops?

A. Yes.

Q. Of course I did not mean, by my question, to include what they call, I think, in Chicago, in grain contracts, option contracts, but my question was whether it was not a usual and customary thing to make contracts for the actual delivery of future hops out of future crops.

A. Yes, sir. That is the way I understood your question.

Q. It is a common thing in the trade for hop merchants to have applications from customers to quote prices for such future deliveries, and to quote prices for such future deliveries?

A. Yes, sir.

Q. What is the difference between the market price of Pacific Coast hops in San Francisco, and the market price in New York?

A. The difference would be about the difference in freight, which is a cent and a half.

Q. Is it or is it not a fact that most of the large dealers in New York who deal in Pacific Coast hops, also deal in San Francisco?

43 A. Yes.

Q. Is that the case with the plaintiffs here?

A. Yes, we have a house in New York, a house in San Francisco, one in Salem, Oregon, one in Washington, and one in England.

Cross-examination.

By Mr. Moon:

Q. I understand you to say that you are at present employed by the plaintiff firm, Horst Bros.?

A. Yes, sir.

Q. I also understand you to say that you have been engaged in this business how many years?

A. About five years.

Q. Do you mean in your present position of buying and selling hops?

A. Yes.

Q. Do you as agent for Horst Brothers purchase hops on the Pacific coast?

A. Yes.

Q. And also sell them to the trade here?

A. Yes.

Q. Recalling your attention to the market price of hops of the crop of 1896 about October, and the following months of the year 1896, what basis have you now for saying that the price of hops on October 24, 1896, of the crop of 1896 was about seven to seven and a half cents in New York?

A. I base that statement upon my own experience in selling, and coming in contact with brewers all over the United States, with other dealers, and conversations with them. There were instances where brewers showed me correspondence from other dealers offering hops at those prices.

Q. Have you any record of any sales made by you of prime Pacific Coast hops of the crop of 1896 during the month of October, 1896, for the price that you have named?

A. I can get that record.

Q. You have not got it now?

A. No, sir.

Q. And you are not testifying now based upon an examination of any record of that kind?

A. Yes, but I can't give you the exact date. It was in the month of October.

Q. There were fluctuations in the price of hops during the

44 month of October, 1896, and particularly in the month of November, was there not?

A. There was fluctuation, yes. Hops advanced along about November.

Q. Did not the price of hops in the latter part of October, and during November and December, advance very materially?

A. It advanced considerably.

Q. Is it not true that prime Pacific Coast hops were selling at that time at prices ranging from thirteen to fifteen cents a pound?

A. No, sir; we did not get any such prices for hops.

Q. Do you mean to say that they were not sold on the market by large dealers in large quantities at prices about like those during those months?

A. I sold in the month of November, I think, at eleven cents strictly prime hops.

Q. I think it is important that we should have an understanding about the grade of hops. It has been testified here by the depositions that the classifications were choice, prime, medium, and common. Those are the general classifications recognized in the trade, are they not?

A. Yes. There are common, medium, prime, choice, and fancy.

Q. Take the designation choice Pacific Coast hops. There is a pretty wide divergence, is there not, within the range of that one term; that is, no two persons would necessarily say absolutely that the same hop was choice?

A. That would depend on their experience.

Q. Is there not a wide range of quality, even under the term choice? There is a better choice, and a poorer choice, is there not? There is a choice that would take the highest standard, and one that would merge down toward the dividing line to medium, is there not?

A. We do not classify them that way in the market. They are either choice, or fancy, or prime, common, or medium.

Q. But the standard is not an absolute standard, absolutely unvarying?

A. Yes, sir; I think it is in the market.

Q. The judgment, skill, and experience of the dealer has to come in to make that classification, has it not?

A. Yes, sir; certainly.

Q. I repeat, is there not, in the designation of choice hops, a difference of grade, although under the same name—that some would be better than others?

A. If a lot of hops is graded choice I do not know that you could make any different grade out of it.

45 Q. You would expect to sell the hops for choice?

A. Yes.

Q. Are you an expert at all in the selection of hops?

A. Yes, sir.

Q. Did you ever have any experience in taking a large lot of hops and dividing it into the various grades?

A. Yes, sir.

Q. Do you never have any difficulty at all in telling that a particular bale of hops is all perfectly choice, or all prime?

A. Well, it is difficult, but at the same time——

Q. You are expected to do it?

A. Yes.

Q. But it is difficult?

A. Well, it depends upon your experience, and your knowledge of hops. In the case of the man with very little experience or knowledge of hops it would be difficult.

Q. Supposing that he had experience, and had knowledge of hops, are there not a great many hops that occupy the boundary line between the two?

A. For a man who has a good knowledge of hops it is very difficult to fool him on a choice lot of hops.

Q. And therefore it depends on his skill and experience in selection?

A. A man with any knowledge of hops whatever, you would hardly ever fool him on a choice or prime lot of hops. That is, a man in the hop business, buying and selling hops for any length of time, who makes a study of it. Where he spends his money for hops he certainly knows what he is buying.

Q. Wouldn't it depend on the extent of his experience and knowledge?

A. He has to have some experience before he can grade hops.

Q. What is true with regard to choice is also true with regard to prime?

A. What is true of the one would be true of the other. Hops are classified as common to medium, prime to choice, and choice to fancy. That's the way we classify them in the market.

Q. When you have been speaking of the price of hops, seven and a half cents a pound, sold in New York in October, 1896, of the crop of 1896, you mean Mr. Horst's gradation known as prime hops—that is, the party for whom you were selling?

A. Yes; I speak of prime hops—what I call prime hops—my opinion of prime hops.

46 Q. In other words, what Horst Brothers' opinion of prime hops was—that is you were selling for Horst Brothers, and you were selling their product?

A. Yes, sir.

Q. You were selling, therefore, their classification?

A. Yes, sir.

Q. In November you sold hops as high as eleven cents a pound Have you any recollection of December?

A. No, sir.

Q. Have you any recollection of January, 1997?

A. I do not know, but I think I sold them in January, 1897, eleven cents.

Q. Have you any definite recollection about it at all?

A. No, sir.

Q. Then it is purely a matter of memory, trying to recall sales?

A. Yes, sir; I can give you a record of those things in a short time, if it is necessary.

Q. Do you remember whether in the month of January, 1897, there was any difference between the beginning and the close of the month?

A. I think hops were less towards the latter part of the month than the first of the month.

Q. Is that a matter of certainty, or argument in your mind?

A. It is simply my remembrance of going among brewers and selling hops. I remember offering them cheaper. I do not think I sold very many. I did not sell any in the month of February, but was offering them for less money.

Q. Don't you remember that prime Pacific Coast hops of the crop of 1896 were about fifteen cents a pound?

A. No, sir; I offered them at nine and a half cents in February, I remember distinctly—sent a circular out among the brewers.

Q. Do you keep those circulars?

A. No, sir.

Q. Did those circulars designate them as prime Pacific Coast hops of the crop of 1896?

A. I may have the circular with me (examining). I find I have not got it.

Q. Do you remember about the month of March, 1897?

A. I did not sell any in March. I remember what my offers were to brewers over the country.

Q. Why do you remember that?

A. I have very good occasion to remember it. I tele-
47 graphed Mr. Horst from Chicago in relation to a certain lot that Jackson Brewing Co., of Cincinnati, had made me an offer on prime Pacific Coast hops five cents.

Q. Did you accept that offer?

A. No, I asked six and a half.

Q. Your offer to sell them in March, 1897, was at six and a half cents a pound?

A. Yes.

Q. Referring to future contracts, a contract for the sale and delivery of the 1897 crop made in the months of March, April and May, would mean a delivery in March, April and May, 1898. They are not picked until the latter part of August.

A. They begin about the latter part of August.

Q. Therefore, a delivery of 1897 hops to be made in March, April and May, would mean March, April and May, 1898?

A. Yes, sir.

Q. Do you mean to say that in October, 1896, there was any recognized market price for hops to be delivered in March, April and May, 1898?

A. Do you mean for future contracts?

Q. I do. Was there a recognized market price?

A. I couldn't say that there was a recognized market price; that is, one that we went by.

Q. In other words, each man would take the venture, and run the risk of making a price upon his own responsibility, would he not?

A. Of course there were prices that hops were selling at at that time—future contracts being made at certain prices, by other dealers.

Q. Each man would make his own contract—that is, is he attempted to sell futures?

A. No, there was a recognized price, because I call to mind now two firms who had made contracts for future hops at a certain price.

Q. It was a purely speculative contract, because you could not tell anything at all about what the amount of the yield was going to be in 1897?

A. No, sir.

Q. No one could tell that?

A. No, sir.

Q. No one could tell the results of the crop, or its condition, how it might be cured, the state of the weather, and other contingencies. Of course I do not mean to ask that question, as it would be impossible that any one could know, and it therefore would be purely speculative?

48 A. We can only tell from our experience in the business at what prices we can make future contracts.

Q. There was no quotation on the market anywhere of hops of the crop of 1897, in 1896?

A. No, but there were dealers making contracts with growers, and they were making contracts with brewers, and their prices were ranging at that time for the future at from eight to nine cents.

Q. That is what you were offering?

A. No, sir; that is what others had made contracts for.

Q. How do you know?

A. I know from men who told me they had made contracts.

Q. And that is all you know about it?

A. Parties who had made contracts with dealers told me that.

Q. You did not see the contracts made?

A. No, sir.

Q. There were regular market quotations of the market prices of hops of the crop of 1896, in October, 1896?

A. Yes, there were quotations for 1896.

Q. Those quotations, like all others, were indications of the market value on the particular days; in other words, they were the market prices, were they not?

A. I did not consider it so in 1896.

Q. Why not?

A. I was not selling hops at the prices quoted.

Q. Are not the quotations published in the recognized Trade Journal the prices for which hops are sold upon the market for that day?

A. They should be, but I do not find it so.

Q. In 1896 you did not find it so?

A. No, sir.

Q. Did you have frequent occasion in 1896 to know differently?

A. I had occasion to look at the journals. We took one monthly.

I took the journals monthly, and noticed the course, and I was getting no such prices as were quoted.

Q. What journal did you take?

A. The Brewers' Journal was one.

Q. Is that a recognized journal that gives quotations of the hop market?

A. I could not speak about that, but I think it is as good as any of them.

Q. Do you mean that the Brewers' Journals gave higher prices for hops than they were actually buying them themselves?

49 A. I say that the prices quoted in the Journal for 1896 were higher than the prices I got for the hops I sold.

Q. In other words, the purchasers of your hops, and the consumers, in their trade paper, were quoting prices larger than you were able to sell for?

A. I do not know that they quoted those prices.

Q. You say they appeared as their quotations in the Brewers' Journals?

A. They were prices maybe quote- by the dealers.

Q. Is it true that the Brewers' Journal, the trade paper of the consumers of your goods, quoted prices higher than you were able to sell them for?

A. Yes, sir.

Q. Was that true of the month of October, 1896?

A. Yes, sir.

Q. Was it true of any other month?

A. Yes, sir. I do not think I have ever been able to sell hops, either in 1896 or 1897, at the prices quoted in the Brewers' Journal.

Q. Did you notice any other journal?

Q. I do not know that I did. Probably I have.

Q. That is the only one that you can refer to now?

A. Yes, sir.

Q. That was a monthly journal?

A. Yes, sir.

Q. Don't you know that they have in the city of New York a paper that is the recognized standard for the hop trade, and that it quotes prices daily?

A. I know that there are several papers published there, but I do not know that it is considered a recognized authority.

Q. You do not know that it is not, do you?

A. No, sir.

Q. The only one that you have any knowledge of, as a hop dealer, was the Brewers' Journal?

A. Yes. I have probably seen quotations in the newspapers.

Q. Do you recall any particular one that you used to look at?

A. No. I know when I was on the coast in 1896 I noticed the newspapers there.

Q. Do you know that the Journal of Commerce and the Commercial Bulletin quotations are not recognized by any hop trade as the prices governing the market?

A. No, I do not know that.

50 Redirect examination.

By Mr. PRICHARD:

Q. There was one question asked you which I do not think you answered. You were asked whether prime Pacific Coast hops were not selling in the latter part of the month of October, 1896, in the trade for thirteen cents a pound in New York city. You said you were not selling, but I do not think you answered the question directly.

A. I do not think they were selling for that. No, they were not selling for that price—prime Pacific Coast hops.

Q. What were they selling for, if you know?

A. Prime Pacific Coast hops in the latter part of October, 1896, in New York, were selling for not to exceed eight and one-half cents.

Q. Mr. Moon has asked you about newspaper quotations. How long have you been engaged in buying and selling hops?

A. About five years.

Q. Has your business brought you in contact with many other people engaged in the same line?

A. Yes, sir, continually. Most every day I meet people.

Q. Are you able to say whether or not newspaper quotations are considered, by people who buy and sell hops, as much indication of the market price?

A. My experience and opinion is that I do not consider them to be a standard to go by.

Q. How do you find out what the market price of hops is?

A. They way to find out the market price of hops is to go to the brewers and try to sell to them. Then you get the market. When you want to buy them you go to the grower, and offer him a price for them.

Q. How do you find out what other people are offering to buy them at?

A. By coming in competition with them.

Counsel for plaintiff- offers in evidence two letters, plaintiff- to defendant, dated September 18, 1896, and September 27, 1896, referred to in the deposition of one of the plaintiffs, offering hops at seven and three-quarters cents a pound.

Plaintiff- rests.

Defendant's Testimony.

JOHN ROEHM, having been duly sworn, was examined as follows:

By Mr. MOON:

Q. You are a resident of the city of Philadelphia, and the defendant in this action?

51 A. Yes, sir.

Q. Had you, prior to August, 1893, purchased hops from the firm of Horst Brothers, located in New York and San Francisco?

A. Yes, sir.

Q. On August 25, 1893, you entered into these contracts, and your signature is upon them?

A. Yes, sir.

Q. Before that time for how long a period had you been purchasing hops from that firm?

A. Three years.

Q. Were you acquainted with any of the individual members of the firm of Horst Brothers?

A. I only knew Paul Horst.

Q. Was he at that time a member of the firm?

A. Yes, sir.

NOTE.—All objections for relevancy upon either side are reserved until final argument.

Q. What was your method of doing business—did you go to New York to purchase hops, or did members of the firm of Horst Brothers come to your place in Philadelphia to sell hops?

A. They came to Philadelphia to my office.

Q. Who was the member of the firm who came to Philadelphia to sell you hops?

A. Paul Horst.

Q. I understand you to say that up to the time of making these contracts you had never seen any other member of the firm?

A. No, sir.

Q. Had you purchased large quantities of hops of Paul Horst, representing the firm, before this time?

A. I bought from one hundred and fifty to two hundred bales, two hundred and fifty, three hundred, or three hundred and fifty bales every year.

Q. How long have you been engaged in the brewing business?

A. Ten years.

Q. State whether your position as a brewer, and your connection with that business make you an expert judge of the quality of hops?

A. No, sir.

Q. Did you, in your arrangements and contracts with Horst Brothers, through Paul Horst, rely upon your own judgment in the selection of hops?

A. I depended on him. He told me that he was an expert
52 man. When I made the contract with his brother of course I understood by prime first choice.

Q. But did you rely upon your own judgment in the choice of these hops or upon the judgment of any one else?

A. I relied upon Paul Horst.

Q. Why did you rely upon his judgment?

A. Because he told me that he was an expert man, and I am not.

Q. What had been the result? Had hops that he had delivered to you during this period of time been satisfactory to you, and to your trade?

A. Some of them were.

Q. Had you ever had any difficulties at all respecting the quality of the hops with Horst Brothers prior to the time of entering into these contracts?

A. Yes, sir.

Q. Whom did you see regarding the adjustment of those difficulties?

A. We sent the hops over to New York. We returned some hops.

Q. When you came to an adjustment of those difficulties what member of the firm did you see?

A. Paul Horst.

Q. Had Paul Horst always made those matters right?

A. He always made them right.

Q. The correspondence which has been read by Mr. Prichard was dictated by you, or authorized to be sent by you?

A. Yes, sir.

Q. You acted under advice of counsel? You did not receive the hops sent in pursuance of these contracts for the reasons which you have given in the correspondence?

A. No, sir.

Q. Did you buy hops of this same grade and quality to supply the deficiency occasioned by your failure to receive these hops?

A. Yes, sir.

Q. That is, you bought hops of other people to supply your wants at that time?

A. Yes, sir.

Q. Of whom did you purchase hops?

A. I bought a great many hops from different people.

Q. Did you buy any from Paul Horst?

A. Yes, sir.

Q. He himself entered into business as a rival to the old firm, did he not?

53 A. Yes, sir.

Q. Do you remember when you bought hops of Paul Horst?

A. In 1897.

Q. What time?

A. January and February.

Q. Do you know whether you bought the same kind and quality of hops of Paul Horst that you had been supplied under contracts previously by Horst Brothers?

A. I bought from Paul Horst in January and February.

Q. How did the quality of those hops compare with the hops that you had received under the old contracts with Horst Brothers?

A. They were very fair.

Q. State the quality of the hops you got from Paul Horst in January, 1897, and the quality of the hops that you had received from Horst Brothers under your contracts in January, 1896.

A. First-class goods.

Q. Do you remember the price you paid for those hops in January, 1897?

A. Yes, sir; thirteen cents.
Q. For this same grade and quality of hops?
A. Yes, sir.
Q. Did you have any conversation with Paul Horst about the time, respecting this suit and these contracts—that is, after the suit was brought?

(Objected to.)

A. Yes, sir.
Q. Where did that conversation occur?
A. Right in my office.
Q. What, if anything, did Paul Horst say with regard to these contracts?

(Objected to.)

A. When the partners split, each going for himself, then I received a letter from Paul Horst that each one would go for himself, and asking if I was on the market for good hops.

Letter called for and handed to Mr. Prichard.

Q. (Handing letter to witness.) Is that the letter that you received from him on July 8th?
A. Yes, sir.
Q. I call your attention particularly, however, to a conversation which you said occurred between you and Mr. Horst respecting these contracts in suit. What did he say about his interest in them?

54 A. When I received the letter, though I don't remember the date—he came here himself after I got the letter—came to my office. He said that over again—he said that the partners not agreeing each one went for himself—he said that he and the other members of the firm in the division of these contracts put slips in a hat to draw numbers to see who would get the contracts, and Clements Horst drew my contracts.

Q. What did he say about his drawing the contracts of other parties?
A. He said to me, "You can buy where you please; you are not staying under any obligations; you can buy at market prices."
Q. Was there anything said at that conversation, or at any other conversation, about the use of the name Horst Brothers?
A. He said the name was not to be used any more.

Cross-examination.

By Mr. Prichard:

Q. How many contracts had you made with Horst Brothers prior to this one of August, 1893?
A. A five years' contract.
Q. Had you another five years' contract before that?
A. No, sir, no contract at all.
Q. How many years had you bought from them?
A. Three years before I made the contract.

Q. How many times had you seen any of the Horsts in that time?

A. I saw Clements Horst once.

Q. How many times did you see Paul?

A. I saw him every month; sometimes twice a month.

Q. Paul Horst was the one who was in New York, was he not?

A. Yes, sir.

Q. Clements Horst was the one in San Francisco?

A. I don't know where he was. I couldn't tell you.

Q. In August, 1893, you made a five years' contract for your hops at twenty-two cents a pound?

A. Yes, sir.

Q. At that time these four pieces of paper were signed, were they not?

A. Yes, sir.

Q. There were six other pieces of paper for the previous three years?

A. Yes, sir.

Q. Which one of the Horsts signed that contract?

55 A. Clements.

Q. Where was it signed?

A. In my office.

Q. Then you actually made this particular contract with Clements Horst?

A. Paul Horst went to England, and he sent his brother over here to make contracts with me. I didn't want to make any contracts with him at all, because I didn't know him. He said, "You can trust me, because he is my brother." "Well," I says, "if you are as good as your brother, I will depend on you." That's the reason I signed the contract.

Q. The practice was under that contract, was it not, for them to send you before each shipment a sample of the hops which they intended to ship to you?

A. They did.

Q. Then you examined that sample, and said to them either that it was sufficient or that it was not sufficient?

A. Yes.

Q. If you thought that it was not good enough you sent it back and said it wouldn't do?

A. We found out when his brother went away, that is, when Paul Horst went away, they sent goods that were not good goods. As long as Paul was home we all the time had good goods. When he wasn't home I had lots of trouble with them—especially when he himself went away.

Q. Before each shipment you required them to send a sample?

A. He only sent me samples once. They didn't send samples any more, and I sent the hops back again. That was especially when his brother was away.

Q. When did he send you a sample and you send the hops back again?

A. In 1895.

Q. Hops under the five years' contract?

A. Yes.

Q. Did you get another sample?

A. No samples. He didn't send any samples. He didn't pay any attention. I would write him "I don't want those hops, because they are not good." He sent me twenty bales, and they were not much satisfaction. I sent them back again.

Q. How did you find out whether they were good or not?

A. We sent a sample over to the New York expert, cut pieces out of the bags, and had the hops examined by the expert.

56 Q. Do you do that on each shipment?

A. Yes, sir.

Q. You always did that—every shipment?

A. No, sir; not all, but most of them.

Q. When hops arrived you took a sample and sent it to your sampler in New York, and he would report to you whether they were right, or not?

A. The first thing I got an expert brewer to sample the hops.

Q. If he did not approve of them you would send them back?

A. Yes, sir; to New York.

Q. You would require new hops to be sent in their place?

A. Yes, sir.

Q. Mr. Jacks was the man who in 1895 selected hops sent to you under these contracts?

A. I don't know that man at all.

Q. Do you remember a time when Mr. Jacks came on and sold you ten other bales of hops in the spring of 1896?

A. No, sir; I don't know that I ever saw that man.

Q. After the letter from Paul Horst you received a letter from Louis & E. Clements Horst dated July 18, 1896, did you not?

A. Yes, sir.

Q. That letter reads, "Since sending our circular of June 24, 1896, we have seen a circular sent out by our brother and former partner, Mr. Paul Horst, wherein he represents himself as having been the senior partner of our former firm. This statement is untrue. The former partnership was composed of three equal partners," etc., etc. Now you say you have bought hops of Paul Horst in January, 1897?

A. Yes, sir.

Q. Did you buy any hops in October, 1896?

A. No, sir.

Q. Where did you get your supply of hops between October, 1896, and January, 1897?

A. Most hops I got from Paul Horst.

Q. Between October, 1896, and January, 1897?

A. Yes, sir.

Q. Then you bought hops of him before January, 1897?

A. Yes, sir.

Q. What months in 1896 did you buy hops from him?

A. I guess, December.

Q. Where did you get your hops that you used in October and November, 1896?

57 A. We had that much stock on hand.

Q. What did you pay Paul Horst for the hops that you bought in December, 1896?

A. Twelve cents.

Q. How many bales did you buy of him?

A. Sixty. Seventy-five, I guess.

Q. Did Paul Horst suggest to you the writing of this letter of June 27th, in which you say that you have received notice of the dissolution and that you considered the contracts at an end?

A. No, sir.

Q. But he did tell you that you were under no obligation to carry out that contract?

A. Yes, sir; that is what he told me.

Q. When you received from Horst Brothers the letter of September 4, 1896, asking you whether you wished them to ship you the hops under your contract to New York or to Philadelphia, why did you write them, "In response to your letters dated 3d and 4th inst. state that before shipping me any hops always send me samples from which I can select the same as you have been doing in the past"? Why was it, if you did not intend to carry out the contract, that you thus wrote?

A. Because Horst Brothers had given up their partnership, and I didn't pay much attention to it.

Q. But if they wrote you, saying that they were going to ship you hops, and asking you where you wanted them, whether in New York or Philadelphia, why did you reply asking them to send you samples?

A. I never did.

Q. I show you your letter of September 14, 1896. That is written on your letter paper, is it not?

A. Yes, sir.

Q. Who is it signed by?

A. My son.

Q. Where is he?

A. He is right here.

Q. What position did he hold in your place at that time?

A. Superintendent.

Q. Can you explain to the court how it was that your son, and your superintendent, wrote that letter of September 14, 1896, asking Horst Brothers to send sample, in reply to a letter which they had written saying they were going on with their contract?

A. I will tell you why. I remember when Horst Brothers

58 sent me a letter stating the dissolution of their partnership they sent me a sample at the market price.

Q. I think you are quite intelligent enough to answer my question. You have been engaged in a large business in the city of Philadelphia. I call your attention to the fact that on September 4, 1896, Horst Brothers wrote you about carrying out this contract, and asked you where you wanted hops delivered, whether in Phila-

delphia or New York, to which, on September 14, 1896, your son and superintendent, in a letter written on your letter-paper heading, wrote asking them to send sample. I ask you why it was that, if you considered the contract at an end, you allowed your son to write asking for samples?

A. I will tell you over again. When he sent me a letter asking why I didn't take their hops I told my son to write him to send a sample by the market price, and not by the contract.

Q. Do you find anything to that effect in the letter?

A. I do not.

Q. And you think that although you told your son to do one thing, he did another?

A. No, sir; he did just the same as I told him.

Q. You think he did what you told him?

A. Yes, sir.

Q. But as I understand you, you say you told him to write to send samples, not under the contract, but under the market price, and I have shown you a letter in which he writes to send samples, referring to the letters of the plaintiffs in which they allude to the contract. How do you reconcile that discrepancy with your last answer?

A. When that letter was sent I instructed my son. Of course I didn't look over it. He mailed it. That is all I know about it. I instructed him to send samples by market price, and not by the old contract price any more. So he sent the letter away.

Q. Did you instruct your son to write to them at that time that you would not carry out the contract?

A. Yes, sir.

Q. Notwithstanding that he wrote this letter?

A. I don't know anything at all about that letter. I didn't send that letter away.

Q. Did you ever reply to the letter of Horst Brothers to you dated July 3, 1896, in which they said that you had misconstrued the meaning of their notice of dissolution, and that their contract would be carried out?

A. No, sir.

59 Q. Can you tell the court why you did not answer that letter?

A. I didn't take much interest in it any more. When the partnership gave up I bought my goods where I wanted them.

Q. Hops in July, 1896, when you received the notice of dissolution were *they* much lower than they had been at the time you made the contract, were they not?

A. No, to my knowledge they were about twelve cents and thirteen. We paid that.

Q. And the contract price was twenty-two cents?

A. Yes, sir.

Q. Do you recollect Mr. Jack's offering you hops in September, 1896, at seven and one-half cents?

A. No, I don't know that man at all.

LOUIS H. WEHMEYER, having been duly sworn on behalf of the defendant, was examined as follows:

By Mr. MOON:

Q. What is your business?
A. Brewers' supplies and dealer in hops.
Q. You reside in the city of Philadelphia?
A. I do.
Q. How long have you been engaged in business?
A. About twenty years. I have been in business at least fifteen years, and I have been with my father.
Q. What do you mean by brewers' supplies?
A. That takes in odds and ends, bungs, kegs, etc.—different things. We handle hops.
Q. Do you sell them?
A. Yes, sir.
Q. Are you an extensive dealer?
A. We do a fair business, some years seventy-five to eighty thousand pounds, and some years not quite so many.
Q. Do you sell to brewers here in the city of Philadelphia, chiefly?
A. Yes, sir.
Q. Do you sell outside of the city?
A. Not very far. More local.
Q. Were you selling hops in the year 1896 of the crop of 1896?
A. Yes, sir.
Q. Are you familiar with the market prices in October, 1896, of hops of the crop of 1896?
60 A. Yes, sir.
Q. Are you familiar because you made sales, or what is the basis of your familiarity?
A. I was in New York State in 1896, in the hop country.
Q. I speak now about prime Pacific Coast hops of the crop of 1896. Were you familiar with the market price of such hops at that time?
A. Yes, sir.
Q. Did you make sales of hops of that kind at that time?
A. Yes, sir.
Q. State what the regular market price of prime Pacific Coast hops of the crop of 1896 was in the month of October, 1896.
A. In the month of October we did not sell many Pacific coast. Mostly State. In September, we did.
Q. Do you know about what the price of them was in the market?
A. Yes, sir.
Q. Does your position require you to be familiar with current market rates?
A. Yes, sir.
Q. What was the market price in October, if you know?
A. In the latter part of October we got ten to ten and a half cents for prime New York State hops. We did not sell any Pacific Coast hops in October. In November, we did.
Q. As a dealer of long experience are you able to say, if there is

any such thing recognized in the trade, the comparison between the price of State hops and Pacific Coast hops?

A. The average is about the difference in freight. That is, delivered in Philadelphia they run about the same.

Q. You say you made sales of prime Pacific Coast hops in the month of November, 1896?

A. Yes, sir.

Q. What did you get for them at that time?

A. We got as high as fifteen cents.

Q. What was the state of the market at that time?

A. The market was very excitable after election. Before election hops were around eleven and twelve cents. After that they run up. You could not touch them for fifteen.

Q. Did you make actual sales of prime Pacific Coast hops of the crop of 1896 in November, 1896?

A. Yes, sir; I think I did. (Examining.) Yes, I got fifteen cents in the latter part of November for prime Pacific Coast hops. I sold some from thirteen to fifteen cents.

61 Q. How were they in the month of December, if you remember?

A. About the same as November.

Q. Take now the months of January and February. What was the price in January?

A. The month of January averaged thirteen to fourteen. In February it got down around twelve cents. In March, April and May they kept going down all the time after that. The average drop was about the same.

Q. Do you remember how they were in March, April and May?

A. I can't tell you positively. I should judge they ran about eleven cents—in that neighborhood.

Cross-examination.

By Mr. PRICHARD:

Q. Who did you sell to for fifteen cents in November?

A. Different brewers here in the city.

Q. Let me see your memorandum?

A. I have just taken a list out of my book here. I have not got the names.

Q. How many bales were in the lots which you sold for that price?

A. They ran in lots of ten, fifteen, or five bales—some twenty.

Q. Where do you get your hops from?

A. Principally from New York State.

Q. Where do you buy your Pacific Coast hops?

A. I buy them on the market in New York city from the dealers.

Q. Almost all contracts for the sale of large lots of prime Pacific Coast hops are made for delivery in New York city, are they not?

A. Well, I don't know about that. If you make a contract in Philadelphia for delivery you want them delivered here.

Q. What is the largest lot of prime Pacific Coast hops you ever sold in your life?

A. I don't know that I can tell you. About twenty or twenty-five bales. Somewhere along there. I have bought as high as one hundred at a lot at one time—ninety-eight to one hundred.

Q. You went to New York to buy them?

A. Yes, on the market there.

Q. What do you know about the market price of prime Pacific Coast hops in New York city on October 24, 1896?

A. I should judge they were bringing in the neighborhood of ten cents.

Q. What do you know about it?

A. I was not in New York city at that time.

62 Q. You did not know as a fact what the price was at that time in New York city for such hops?

A. No, sir. We did not handle any at that time. I did not go into the market for them.

Q. Are you sure about what you say as to the difference between the market price of New York State hops and Pacific Coast hops—do you mean to say that they are about the same?

A. We got as much for one as we did for the other last fall.

Q. Are you sufficiently posted to state that in the trade the only difference between New York State hops and prime Pacific Coast hops is the amount of the freight?

A. About a cent and a half.

Q. I ask you whether you undertake to say that you have knowledge of the price of those hops in the trade which enables you to make that statement. Are you familiar with the current prices of New York State hops and prime Pacific Coast hops in New York city?

A. Yes, sir.

Q. Can you say that there is usually no difference between the prices of those two hops?

A. They may average a cent. Oh, yes; sometimes there is a difference of a cent or two one way or the other.

JOHN THOMAS, having been duly sworn on behalf of the defendant, was examined as follows:

By Mr. MOON:

Q. You are a brewer of the city of Philadelphia?
A. Yes, sir.
Q. You have been for some years?
A. Yes, sir.
Q. What was the name of your firm?
A. Welde & Thomas.
Q. Were you the buyer of that firm?
A. Yes, sir.
Q. Were you or not large consumers of hops?
A. Yes, sir, considerable.

Q. Did you buy hops in the months of November, 1896, and February, 1897, for consumption at your brewery?

A. Yes, sir.

Q. Of whom did you purchase them?

A. Carl Ullman and the Pacific Hop Company. I forget another party.

63 Q. Did you buy Pacific Coast hops?

A. Yes, sir; they were all Pacific Coast hops. They were choice hops.

Q. What did you pay for choice Pacific Coast hops in the month of November, 1896? (Bill shown witness.) Is that the bill?

A. Yes, sir; twenty-five bales at eleven cents.

Q. Did you buy them at the open-market price?

A. Yes, sir; I paid cash, two per cent. off.

Q. You paid at that time how much?

A. Eleven cents.

Q. Did you buy them in February, 1897?

A. Yes, sir; from the Pacific Hop Co.

Q. Those were also choice Pacific Coast hops, were they?

A. Yes, sir.

Q. What did you pay for them in February, 1897?

A. Thirteen and a half cents; two per cent. off for cash.

Q. Are you able to say from your experience what the difference is in the price of prime Pacific Coast hops and choice Pacific Coast hops?

A. I never would buy anything but choice. In fact I never made any inquiries about prime.

Q. Therefore you are not able to say about that?

A. No, sir.

Cross-examination.

By Mr. PRICHARD:

Q. Each of these lots was a twenty-five bale lot?

A. Yes, sir, and there was, I think one ten-bale lot.

Q. Did you buy any in October, 1896?

A. Not to my recollection.

Q. You buy hops for your own consumption?

A. Yes, sir.

Q. You are not a dealer in hops?

A. No, sir.

MYER GATTMAN, having been duly sworn, on behalf of the defendant, was examined as follows:

By Mr. MOON:

Q. What is your business?

A. Dealer in malt and hops.

64 Q. Do you reside in the city of Philadelphia?

A. Yes, sir.

Q. How long have you been engaged in that business?

A. Six years.

Q. Have you been engaged here in the city most of the time?

A. All of the time.

Q. Do you sell direct to brewers and consumers of hops?

A. Yes, I act as salesman. I represent people in the trade.

Q. Whom do you represent in the hop trade?

A. Hugh F. Fox, of New York.

Q. How long have you represented that firm?

A. Five years.

Q. You sell direct to the consumers for that firm as agent?

A. Yes, sir.

Q. Are you familiar with the various grades of hops that are sold and consumed?

A. Yes, I have a general knowledge on the subject.

Q. There is in the market a hop known as a Pacific Coast hop, is there not?

A. Yes.

Q. Do you know the designation of a prime Pacific Coast hop?

A. Yes, sir.

Q. Do you know what the price of prime Pacific Coast hops of the crop of 1896 was in this market in the month of October, 1896?

A. I sold some in that month at prices ranging from ten to eleven cents—about an average of ten and a half cents.

Q. Are you speaking now about prime hops?

A. Yes, sir.

Q. What is the general range of difference between choice hops of the Pacific coast and prime Pacific Coast hops?

A. That would be a pretty hard thing to tell, because opinions vary so much as to what the quality of a hop really is. One man might call it a choice hop, and another man might call it prime.

Q. There is a wide divergence?

A. Yes, sir. It is not like grain, that has an established grade. You may show a sample of hops to one man, and he would think it was very fine, while another wouldn't look at it or like it at all, either from its flavor or appearance, and from many different things to a man's fancy.

Q. Does it require experience, skill, and knowledge to be able to grade hops between choice and prime and prime and medium?

65 A. Yes, I think so.

Q. Is there a wide divergence of quality, for instance, in the term prime?

A. Yes, there is quite a difference. One might be very good prime, almost choice, and one might be poor.

Q. One might be almost choice, and one might be almost medium?

A. Yes, sir. One might be so near choice that you couldn't tell the difference, and the other very poor, but still they might be called prime hops on delivery.

Q. You say you have not sufficient knowledge to be able to tell what the difference was between choice and prime hops?

A. As I have said before, there is a wide difference of opinion. Extra prime or choice might bring just as much as poor choice, because it would be hard to tell. Different men would have different opinions. You might get half a dozen men, and not any of them have the same opinion—no two of them.

Q. You say you sold prime Pacific Coast hops in October for from ten to eleven cents?

A. Yes, sir. The reason of that was that in the beginning of October the market was lower. It gradually stiffened as the month progressed.

Q. Do you remember about October 24th; can you fix definitely any date as to the time you sold these hops?

A. No, I couldn't say positively about the date. I know that in the early part of the month hops were cheaper than they were later. Well, I do know, too. I sold some at ten and a half cents on the 14th of October, and later in the month, about the 29th, I think it was, or somewhere along there, or anyway in the latter part of the month, at eleven cents.

Q. Can you state the prices in the month of November?

A. There was a sudden advance in November. Just before election they were selling at about eleven to twelve, and almost by the middle of November they were selling at fifteen. I sold some at fifteen.

Q. How about the price in December of that year?

A. They were a little easier than they were in November—probably a cent less—about fourteen cents.

Q. How about the first of the year?

A. In January they began to go down. I think in January they were worth twelve to thirteen cents, so far as I can recollect.

Q. What were they in March?

66 A. I couldn't tell you really, because I didn't post myself. I didn't know that I was going to be asked the market any later than that, and I didn't look it up. I know they were lower.

Q. You have made the particular investigation about which you were asked to testify?

A. Yes, sir; I referred to sales that I personally made.

Cross-examination.

By Mr. PRICHARD:

Q. You are speaking always in giving these prices of prime Pacific Coast hops?

A. Yes, sir. Well, prime to choice. As I looked at it they were just good brewing hops—about average quality.

Q. You know, do you not, that for very many years there have been recognized grades of Pacific Coast hops known as choice, and as prime?

A. Yes, sir.

Q. Quotations are so made?

A. Yes, they are quoted that way.

Q. Throwing aside extra qualities of prime or inferior qualities,

of choice, the average hop operator or seller has no particular difficulty in distinguishing those grades, has he?

A. Yes, because if you look at the quotations most any day you will see that hops are quoted—today—though I do not know the exact quotation—but from general experience, that there are variations in grades—there is no fixed standard—no one could say positively that such and such a grade was prime, or that such and such a grade was choice.

Q. That is to say, in giving quotations of hops, as of anything else, they usually give the minimum and maximum, from seven to nine, or from six to five?

A. Yes, something like that.

Q. But the highest quotations for prime are less than the lowest quotations for choice, are they not?

A. Yes, sir.

Q. I again ask you whether a person skilled in the trade has any particular difficulty in distinguishing between an ordinary choice and an ordinary prime hop?

A. No, if it was an ordinary choice. If it was near the same quality though, it would be difficult. It would be a subject of controversy between experts, even, as to whether it would grade prime or choice.

67 Q. Do you consider yourself an expert on the subject of grading hops and the prices of hops?

A. In a general way. I do not consider myself letter perfect. I do not think any man is.

Q. What do you deal in besides hops?

A. Malt.

Q. Anything else?

A. Yes, corn goods. Malt, hops, and corn goods—grits.

Q. How many bales of Pacific Coast hops do you handle in a year?

A. It varies. Some years from two hundred to as much as five hundred in one year.

Q. In 1896 about what was the total of your sales of Pacific Coast hops?

A. Between four and five hundred.

Q. Do you sell to brewers here in Philadelphia?

A. Yes, sir.

Q. Did you ever sell in New York city?

A. No, sir.

Q. Do you know anything about the market price of hops in New York city?

A. Yes, sir.

Q. Can you state what the market price of prime Pacific Coast hops was in New York city on October 24, 1896?

A. Only from quotations given me to sell by, which were usually about a cent a pound more than the New York price.

Q. You mean the prices that your principals sent you here as authority to sell?

A. Yes, sir.

Q. You had not a fixed price at which you sold?

A. No, sir.

Q. You got specific instructions from your principals that you could sell at such and such prices?

A. Yes, I offered at those prices. They were based of course upon market value.

Q. Did you, outside of the instructions that you received from your principals, have sufficient knowledge of the trade generally to be able to say what the ruling market prices were in New York on October 24, 1896?

A. Just what information I could get from the trade journals and papers, the Journal of Commerce, for instance, of New York, and the New York Tribune. As most business men do I
68 would keep myself posted as to the market price of articles that I dealt in. I couldn't do much business if I did not.

Q. But you only sold at prices given by your principals?

A. Certainly, at fixed prices. It was not my property.

Q. What number of bales did you sell on October 29, 1896?

A. I did not say I sold any on that date. I said about that time.

Q. When did you sell in October?

A. On the 14th of October I sold ten bales that I remember at fifteen cents.

Q. What kind of hops were those?

A. Those were choice Pacific hops. They were sold as choice.

Q. Did you not say in your examination-in-chief that you sold for nine and a half on the 14th of October, and that they went up subsequently?

A. No.

Q. Did you not say that they went up later in the month to a higher price, and that you sold about October 29th at that price?

A. No, sir; I don't think I have given any such testimony.

Q. Now you say that on October 14th you sold ten bales of choice Pacific at fifteen cents a pound?

A. Yes, sir. No. I have got that wrong. That was in November. I sold those at ten and a half cents. On the 29th, or about that time, I sold at eleven cents.

Q. What was it you sold at eleven—how many bales, and what hops?

A. I don't remember the exact number of bales. It was not a very large lot. I think it was ten or fifteen bales.

Q. What grade of hops?

A. Prime Pacific hops.

Q. Who did you sell them to?

A. I do not know that that is any business of the court's, or of yours.

Q. I want to test your recollection.

A. I know who I sold them to, but I do not think it is necessary for me to expose my business here. The reason I remember is that I have competitors in the business, and I do not care to expose my business to them. Another thing is, that a brewer buying from

me don't care to have every one know what he has been paying for his material, or who he is buying from.

Q. You think this was the ordinary market price, don't you?

A. Yes, sir.

Q. Do you think any customer of yours who bought fifteen
69 bales of hops could object to having it said that he bought at the ordinary market price from you?

A. I don't know whether he would or not.

Counsel for defendant offers and reads in evidence deposition of William Ullman.

Counsel for defendant also offers in evidence copies of Journal of Commerce giving quotations of prices for October 23 and 24, 1896, also during the months of March, April and May, 1897, and September, 1897. The report of Journal of Commerce and Commercial Bulletin, Saturday, October 24, 1896, gives Pacific Coast hops of 1896, choice, ten and a half cents per pound.

Medium to prime, seven to nine and one-half cents per pound.

October 26, 1896, same prices.

March 24, 1897, prime Pacific Coast hops, from ten to eleven cents.

April 24, 1897, prime Pacific Coast hops crop of 1896, from eight and a half to nine and a half cents.

May 24, 1897, for same, eight to nine cents a pound, being medium and prime.

July 24, 1897, prime Pacific Coast hops crop of 1896, medium to prime, eight to nine cents a pound.

October 25, 1897, medium to prime, from fourteen to fifteen cents a pound for Pacific Coast hops.

Mr. Wehmeyer states that in November, 1897, they were about the same as in October, 1897.

Defendant closes.

Plaintiff's Testimony in Rebuttal.

Mr. JACKS, heretofore sworn, further examined, as follows:

By Mr. PRICHARD:

Q. Mr. Ullman has testified that Mr. Lovedale has been connected in business, or has been connected with the plaintiffs in different hop deals in the last six or seven years. Is that so?

A. He has been connected in no hop deals, any more than we have sold his hops on commission.

Q. In reference to hops of the crop of 1897, what was the market price in November, 1897?

A. I sold hops last month, prime hops, Pacific, at eleven cents, delivered here.

70 Cross-examination.

By Mr. MOON:

Q. When you say that this man was not connected in any deals,

how do you know—you are not a member of the firm of Horst Brothers?

A. I have access to the books when I am there.

Q. You have not made any especial investigation of the books to see whether Lovedale was interested in any deals, have you?

A. I was there in the office two years, and had access to the books all the time.

Q. You charged hops that you sold, or collected money from people to whom you sold. You did not make an examination of all the records of the company, did you?

A. I think I made an examination of all the accounts kept with all the parties. I was often going over the books.

Q. Did you ever make a special examination of this matter?

A. No, sir.

Q. What do you know of what arrangements were existing between Lovedale and your employers, as to hop contracts?

A. If there was any partnership between them it would be shown on the books.

Q. There is no statement to the effect that any partnership existed between them at all. You do not know anything about what other arrangements existed between the two, do you?

A. If there was anything confidential between them I would not know, but anything of that kind would appear on their books, I think.

Q. Do you know anything about the books except what concerned your transactions with the firm?

A. I saw the books daily there whenever I wanted to look over them, and I saw no account with Lovedale.

Testimony closed.

Deposition of E. Clemens Horst.

E. CLEMENS HORST, being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. JOHNSON:

Q. State your name, age, residence and occupation.

A. My name is E. Clemens Horst; my age is 31 years; my occupation is hop and barley merchant. I am a citizen and a resident of San Francisco, California.

Q. Are you a member of any firm or copartnership?

71 A. I am a member of the firm of Horst Brothers.

Q. State the names and residences of the other members of the firm?

A. There is only one other member of that firm and his name is Louis A. Horst, who is a citizen of Chicago, Illinois.

Q. Formerly was any other person associated with you in business with Louis A. Horst?

A. Yes, sir; my brother, Paul Horst, a citizen of the city of Brooklyn, New York.

Q. How long have you been engaged in the hop business?

A. About ten years.

Q. Are you one of the plaintiffs in this action?

A. Yes, sir.

Q. How long have you and your brother, Louis A. Horst, been associated together in that business?

A. The present partnership has been running since June, 1896, though I have been associated with my brother during the last ten years.

Q. Prior to June, 1896, were your brother and yourself associated with anybody else?

A. Yes, sir; with my brother, Paul Horst.

Q. And in what business were the three of you engaged in prior to June, 1896?

A. In the hop business.

Q. As what?

A. As copartners, doing business under the firm name of Horst Brothers.

Q. That copartnership continued until June, 1896?

A. Yes, sir. After June, 1896, my brother, Louis A. Horst, and I continued together in business as Horst Brothers.

Q. Do you recall a contract entered into between the former firm of Horst Brothers and John Roehm?

A. Yes, sir.

Q. How many such contracts were there?

A. There were four contracts, that is, there were altogether ten contracts, six of which have been fulfilled and four of which have not been carried out. These being the four now in dispute.

Q. When the original firm of Horst Brothers dissolved in 1896, who succeeded to these contracts?

A. My brother, Louis A., and I succeeded to these contracts.

Q. The four contracts which you referred to as not having
72 been carried out, are they the same contracts that are the subject-matter of this action?

A. Yes, sir.

Q. From the time of yourself and brother, Louis A. Horst, succeeding to the contracts referred to in the complaint in this action were you at all times ready and able to perform the conditions of those contracts?

A. Yes, sir.

Q. Did you at any time attempt to perform either of those contracts; if so, which and when?

A. I made shipment of the first installment called for by this contract for one hundred bales of crop of 1896, of which twenty bales were to have been shipped or delivered during the month of October, 1896. I did ship twenty bales.

Q. And you shipped from where to where?

A. I shipped them from the Pacific coast to New York.

Q. What was the quality of the hops shipped by you?

A. Prime Pacific Coast hops of the crop of 1896.

Q. So you recollect the date of that shipment?

A. That shipment was October 8th, 1896.

Q. What was the weight of the twenty bales that were shipped by you—that is the weight per bale?

A. Those twenty bales weighed gross 3,991 pounds. The tare, according to the contract, was 70 pounds, and the net weight was 3,921 pounds.

Q. These twenty bales were shipped to whom?

A. To John Roehm.

Q. Where?

A. At New York city.

Q. Did they arrive there?

A. Yes, sir.

Q. Were they received by Mr. Roehm, the defendant?

A. No, sir.

Q. Did these hops, in every way, conform to this contract?

A. Yes, sir.

Q. Have they ever been received by John Roehm?

A. No, sir.

Q. Prior to the shipment of these hops had you received any communication from Mr. Roehm in relation to the contracts that had been entered into between you and him?

A. Yes, sir; a number of them.

Q. The first communication that was received by you from
73 him in relation to the particular four contracts in controversy here was dated when?

A. It was dated June 27th, 1896.

Q. Have you the letter now that you received at that time?

A. I have a copy of it.

Q. And the original is where?

A. In the hands of my attorneys in New York.

Q. The letter is headed how?

A. John Roehm, Bavarian and lager beer brewery, 856 Charlotte street, Philadelphia, June 27th, 1896. Messrs. Horst Brothers, 42 Pearl street, New York city.

Q. Prior to that time had you sent any notification to Mr. John Roehm?

A. Yes, sir.

Q. And what was that notification, please?

A. On June 23d, 1896, we notified him that the firm of Horst Brothers, consisting of Paul Horst, Louis Horst, and E. C. Horst, had been dissolved.

Q. What sort of notice was that?

A. A printed notice.

Q. Was that sent to all of your correspondents and those with whom you had dealings?

A. Yes, sir; that was sent to all of our correspondents.

Q. Did you reply to the communication of June 27th, 1896, received by you from John Roehm?

A. My brother, Paul, replied thereto in a letter dated New York, July 3d, 1896, in which he notified John Roehm that he had misconstrued the meaning of the notice of dissolution sent by us to the trade and that its meaning was simply that no new contracts

would be made, and no new business undertaken by the firm of Horst Brothers. So far as the firm or business is concerned the firm will discharge its obligations and will try to collect its claims, and that it does not ask for any releases or discharges and will punctually live up to all the contracts which it has made with you.

Q. Do you know whether or not yourself and your brother, Louis A. Horst, when in June, 1896, you continued in business under the firm name of Horst Brothers, received any assignment or transfer from Paul R. G. Horst, one of the former members of your firm?

A. Yes, sir.

Q. State whether or not the assignment related to the business formerly conducted by the old firm of Horst Brothers?

A. We received an assignment from Paul Horst of a number
74 of contracts, among which were these four contracts with John Roehm, and in addition we received a particular assignment from Paul R. G. Horst of these contracts with Roehm, dated July 1st, 1896. The later assignment was in the nature of a communication by Paul R. G. Host, of that date, to Mr. John Roehm, Philadelphia, Pennsylvania, notifying Roehm that the contracts with him had been assigned to Louis A. and E. Clemens Horst.

Q. Was that assignment from your brother, Paul R. G. Horst, to yourself and Louis A. Horst, sent to Mr. John Roehm?

A. That assignment was made in duplicate and one of these was sent direct by us to John Roehm, enclosed with our letter to him, dated October 23d, 1896.

Q. A copy of that letter, dated October 23d, 1896, is where?

A. A copy of that letter is with our attorney in New York. The original was sent by registered mail to John Roehm.

Q. Did you receive the receipt?

A. Yes, sir.

Q. Signed by John Roehm?

A. Yes, sir.

Q. Did you have other correspondence with John Roehm in relation to your contracts with him and the business of your firm with him?

A. We did. We wrote him under date of September 3d, 1896, from San Francisco. We received from him a letter dated September 14th, 1896. We wrote him September 4th, 1896. Wired him September 21st, 1896; wrote him confirming our wire September 21st, 1896, and again wrote him by registered letter October 9th, 1896, and on October 20th, 1896; we received a dispatch from him October 24th, 1896, declining to receive the shipment of hops that we sent to him pursuant to the contract, and we replied to his wire October 24th, 1896, saying we would await particulars of his letter. We received a letter from him dated October 24th, 1896, and replied October 29th, 1896. We likewise received a letter from Mr R. O. Moon, purporting to represent Mr. Roehm, dated October 24th, 1896, which letter was addressed to Paul R. G. Horst, 42 Pearl street, New York city. Subsequently we received a letter dated October 31st, from Mr. R. O. Moon, representing Mr. Roehm. These copies of our letters were retained and these copies have been for-

warded for use at the trial of this action. The original letters received from Roehm have been forwarded likewise for introduction in evidence at the trial of this action. The dates are here given merely for the purpose of identification. After the first repudiation by Roehm referred to hereinbefore, in a letter received from him by us, dated June 27th, 1896, we received a letter dated September 14th, 1896, in which Mr. Roehm says as follows: I take this
75 verbatim from accurate and compared copy of the letter received from Roehm of that date, the original of which will be introduced in evidence.

"Messrs. Horst Brothers, San Francisco, California.

DEAR SIR-: In response to your letter dated 3d and 4th insts. state before shipping me any hops always send me samples, from which I can select lots the same as you have been doing in the past.

JOHN ROEHM, JR."

Q. To what did the letter of September 14th, 1896, refer?

A. He referred to our letters of September 3d and September 4th, 1896, wherein we advised him that we would make the shipments of the hops called for by the four contracts in question and asking him whether we should ship the hops to him direct to Philadelphia or else to New York, as called for by the contracts.

Q. Did you write Roehm under date of September 27th, 1896?

A. Yes, sir.

Q. State what hops were referred to in that letter.

A. We offered him a very fancy lot of new crop Pacific Coast hops at seven and one-half cents per pound, delivered in Philadelphia.

Q. Was that letter in reference to the contracts that had been entered into between you and him?

A. No, sir; that was offering him other hops in addition to those already purchased by him.

Q. After the shipment of the twenty bales which you say Roehm refused to receive in October, 1896, did you see Mr. Roehm personally?

A. Yes, sir; I called at his office in Philadelphia and saw Mr. Roehm personally.

Q. Can you tell when you received the first positive declination from Roehm in which he refused to receive the hops shipped by you under the contract?

A. Yes, sir. The first positive declination I got from him was on October 24th, 1896, by telegraph—that is the declination of hops that we had shipped under the contract, though he had previously notified us that he would not receive the hops called for by the contract. That is on June 27th, 1896. Subsequently on September 14th, 1896, he wrote us before shipping any hops, meaning under the contracts in question, that we should send him samples from which he could select hops.

Q. State the contents of the dispatch received by you October 24th, 1896, referred to in your last answer.

76 A. The telegram was addressed "Horst Brothers, San Francisco," and read: "I decline to receive shipment of hops October 9th. Particulars by mail." The telegram was signed John Roehm.

Q. Now, after that date you say you had a conversation with Mr. Roehm in relation to the contracts. State when and where that occurred and what that conversation was.

A. The conversation we held in Mr. Roehm's office in Philadelphia. I asked Mr. Roehm to receive the hops called for by the contracts and he replied that he would not receive any hops under the four contracts in dispute. I told him we were ready and willing to comply with the contracts and ship the hops as provided therein, at the time specified in the contracts, but he refused to accept any hops under the contracts and — that he considered the contracts annulled. This conversation was in March, 1897.

Q. Did you have the hops called for by the contracts and were you ready to ship them in the amounts required during the months of November and December, 1896, and the months of January and February, 1897?

A. Yes, sir.

Q. And did you have and were you ready and willing to ship the hops called for by the contracts in the quantities therein named, to wit, twenty bales each month during the months of March, April, May, June, and July, 1897?

A. Yes, sir; in fact we have the hops yet and ready to deliver them even now.

Q. Were all of these hops that I have reference to that you were ready and willing to ship and that you had on hand and that you have now on hand prime Pacific Coast hops of the crop of 1896?

A. Yes, sir.

Q. Were the hops that you had shipped and those you had on hand ready to ship in conformity to the contracts carefully and skillfully picked, cured, baled and shipped and were they in good merchantable order?

A. Yes, sir.

Q. Are you ready and willing and able to ship in the month of October, 1897, and in the successive nine months thereafter twenty bales of prime Pacific Coast hops of the hop crop of 1897, in accordance with our contracts relating to the hop crop of 1897?

A. Yes, sir.

Q. Was there any other reason that you did not ship to Mr. Roehm, the defendant, the hops called for by the contracts of the crop of 1896, except his refusal to receive them?

A. There was no other reason.

77 Q. Will you state the weight of the hops to be delivered by you in the future and that were ready to be delivered by you in the past under your contracts (to him).

A. About two hundred pounds per bale.

Q. Is that gross?

A. That would be gross weight.

Q. And you deduct then three and one-half pounds tare per bale?

A. Yes, sir.

Q. That would leave the net weight of the hops per bale what?

A. 196½ pounds per bale.

Q. Do you know what the market price of prime Pacific Coast hops was during the entire year of 1896 in New York city?

A. Yes, sir.

Q. State how you know.

A. We have our own house in New York city and we have our traveling men traveling around among the brewers in all the large brewing cities in the United States.

Q. Do you keep posted as to the market prices of hops throughout the United States at all times?

A. Yes, sir.

Q. Is that a part of your business?

A. Yes, sir.

Q. A necessary part?

A. Yes, sir.

Q. And during 1896 and for a long time prior thereto you had been engaged in buying and selling hops?

A. Yes, sir; all over the United States.

Q. State what the market price of prime Pacific Coast hops of the crop of 1896 was on October 24th, 1896, in New York city?

A. Seven and a half cents per pound.

Q. Prior to October 24th, 1896, was the market price higher or lower for prime Pacific Coast hops in New York city than seven and a half cents per pound?

A. The market price was lower: in fact so much lower that hops were not worth picking, and a large proportion of the crop remained unharvested.

Q. In October, 1896, did you enter into any contracts or purchase any Pacific Coast hops of the crop of 1896?

A. Yes, sir; on October 24th I bought one crop of prime Pacific Coast hops of 550 bales. The purchase was made at five cents per pound on the Pacific coast, which would be the equivalent of six and a half cents per pound in New York city; during that month we bought many thousands of bales at that same price.

78 Q. Do you know what the market price of prime Pacific Coast hops of the crop of 1897 was on October 24th, 1896, in New York city?

A. Yes, sir.

Q. What was it?

A. From eight and a half to nine and a half cents per pound.

Q. Will you state what the custom of the hop trade is in relation to the purchase or sale of hops not yet grown?

A. Hops are bought and sold for future delivery, in fact, as much as ten years ahead.

Q. On October 24th, 1896, do you recall any sales or purchases made of prime Pacific Coast hops of 1897?

A. The market at that time was in such a condition that notwithstanding we had a number of men traveling around trying to sell hops of the crop of 1897, in the East and in New York city, and

elsewhere, we were unable to effect many sales, though we did make purchases on the Pacific coast, and so did many other dealers, at from seven to eight cents, on the Pacific coast, which is equivalent to eight and a half to nine and a half cents a pound delivered in New York city, the freight rate being one and a half cents per pound, and on that same date, October 24th, 1896, I bought one hundred (100) bales of prime 1897 crop Pacific Coast hops at eight cents per pound on the Pacific coast, which is equivalent to nine and a half cents per pound delivered in New York city.

Q. On October 24th, 1896, and during the month of October of that year, did you have on hand 200 bales of prime Pacific Coast hops of the crop of 1896?

A. Yes, sir.

Q. Did those hops in every particular conform to the contracts in relation to the hop crop of 1896, entered into between yourself and Mr. Roehm?

A. Yes, sir.

Q. Who was the individual, the person who made the contract in behalf of your firm, with the defendant, Mr. Roehm?

A. My brother and present partner, Mr. Louis A. Horst.

Q. Of your firm who was the one who did the selecting and purchasing of Pacific Coast hops?

A. I did all the selecting and purchasing of Pacific Coast hops for both the old firm and the present firm of Horst Brothers.

Q. For how long have you done all the selecting and purchasing of Pacific Coast hops for your firm?

A. Ever since our firm was organized, about nine or ten years ago.

79 Q. Have you had any contracts for Pacific Coast hops with Mr. Roehm for year prior to 1896?

A. Yes, sir.

Q. For how many years?

A. For three years prior, two hundred bales each year.

Q. Will you state whether or not those contracts — entered into at the same time the contracts in controversy in this case were entered into?

A. Yes, sir.

Q. Who had selected and purchased and shipped the hops under the contracts that were fulfilled with Mr. Roehm prior to 1896?

A. I had selected, purchased and shipped all the hops on the Pacific coast handled by our firm, and Mr. Roehm usually made his own selections from Pacific Coast hops shipped by me to New York city, out of which samples were sent to him.

Q. In 1896, were you engaged in growing hops as well as buying and selling them?

A. Yes, sir.

Q. And have you since been engaged in growing hops?

A. Yes, sir.

Q. Will you state to what extent you were engaged in growing hops?

A. To a much greater extent than the number of bales here in question.

Q. Will you state whether or not prime Pacific Coast hops are a staple trade article?

A. Yes, sir.

Q. State whether or not there are different grades of hops?

A. Yes, sir; there are different grades. The finest grade of Pacific Coast hops would be "fancy." The next lower grade would be "choice," and the next lower grade to choice would be "prime," then after that the next lower grade would be "medium," and the lowest grade would be "common." Those several grades are universally recognized among the trade.

Q. What was the condition of the market for prime Pacific Coast hops of the crop of 1896 in October, 1896, during the entire month?

A. The condition was that the brewers were heavily overloaded with hops just as this was the cause all over the world and selling was very difficult. It was almost impossible to find buyers. This was the case with the 1896 crop hops as well as the 1897 crop hops.

Q. What is the market price at New York city now for prime Pacific Coast hops for the crop of 1896?

A. The market price now is about four cents a pound.

E. C. HORST.

80 *Deposition of T. P. Lovdal.*

T. P. LOVDAL, being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. JOHNSON:

Q. State your name, age, residence and occupation?

A. My name is T. B. Lovdal. My age is 44 years. I reside in Sacramento, California. My occupation is that of a grower and dealer in hops.

Q. How long have you been a grower and dealer in hops?

A. For more than twenty years.

Q. To what extent are you a grower in hops?

A. Largely; I think I am the largest grower of hops in the world.

Q. Are you now and have you been familiar with the market price of hops?

A. Yes, sir.

Q. And for how long have you been familiar with the market price of hops?

A. It is a part of my business to be familiar with the market price of hops and I have been so for many years past.

Q. And during the year 1896, were you engaged in the growing, buying and selling of hops?

A. Yes, sir.

Q. To the same extent as you now are?

A. Yes, sir.

Q. State where you sell?

A. I sell to dealers and brewers in all parts of the United States and wherever I can find a customer.

Q. Do you know what the market price of prime Pacific Coast 1896 crop hops was on October 24th, 1896, in New York city?

A. Yes, sir.

Q. What was it?

A. From seven to seven and a half cents per pound.

Q. Do you know what the market price of prime Pacific Coast hops of the crop of 1897 was on October 24th, 1896, in New York city?

A. Yes, sir.

Q. What was it?

A. Well, from eight and a half to nine and a half cents per pound.

Q. While you have been engaged in growing hops have you been engaged in growing, buying and selling prime Pacific Coast hops?

A. Yes, sir.

81 Q. And were you so engaged during the year 1896?

A. Yes, sir.

Q. Were you engaged in growing and selling for present crop sales and also for future years' crops?

A. Yes, sir; I have sold present crops and sold future crops for as many as five years in advance of the year of sale.

Q. State whether or not there are different grades of hops.

A. Yes, sir.

Q. What are they?

A. Hops are graded in the trade as follows: Commencing with the lowest, common, medium, prime, choice, and fancy.

Q. State whether or not prime Pacific Coast hops are a staple article of trade.

A. They are.

Q. Prior to October 24th, 1896, was the market price of prime Pacific Coast hops of the crop of 1896 higher or lower than seven and one-half cents a pound that you have mentioned?

A. It was much lower.

Q. What is the market price of prime Pacific Coast hops in New York city at the present time?

A. About four cents a pound.

T. B. LOVDAL.

Deposition of Charles Schmidt.

CHARLES SCHMIDT, being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. JOHNSON:

Q. State your name, age, residence, and occupation.

A. Charles Schmidt, 45 years of age, residence San Francisco, California, and hop dealer by occupation.

Q. How long have you been engaged in business as a hop dealer?

A. Over twenty-five years.

Q. State your business—what I mean is whether you buy and sell or whether you grow any hops.

A. I buy and sell.

Q. Where have you been engaged in business during the time that you have named?

A. In San Francisco, California.

Q. To what extent have you been engaged in that business?

A. We are pretty fair dealers. Sometimes five or ten thousand bales a year; depending on circumstances.

82 Q. Are you now and have you been familiar with the market price of hops during the time you have been engaged in business?

A. Yes, sir.

Q. State whether or not it is a part of your business to be familiar and to make yourself familiar with the market price of hops.

A. Yes, sir, it is.

Q. State whether or not your business is confined to San Francisco or whether you have sold hops in other places.

A. We sell hops throughout the United States.

Q. State whether or not you are familiar with the prices of hops in the United States.

A. Yes, sir.

Q. And during the year 1896, were you engaged in this business to the same extent that you now are?

A. Yes, sir.

Q. And selling as you have already stated all over the United States?

A. Yes, sir.

Q. Do you know what the market price of prime Pacific Coast hops of the crop of 1896 was on October 24th, 1896, in New York city?

A. Yes, sir.

Q. What was it?

A. From seven to seven and a half cents a pound..

Q. Do you know what the market price of prime Pacific Coast hops of the crop of 1897 was on October 24th, 1896, in New York city?

A. Yes, sir.

Q. What was it?

A. From eight to ten cents a pound.

Q. During the time you have been engaged in the buying and selling of hops, have you been engaged in buying and selling prime Pacific Coast hops?

A. Yes, sir.

Q. And were you so engaged in the year 1896?

A. Yes, sir.

Q. Were engaged in buying and selling for present crops as well as for future years' crops?

A. Yes, sir.

Q. State whether or not there are different grades of hops.

A. There are.

Q. State what those grades are.

83 A. Common, prime, choice, and fancy.

Q. State whether or not prime Pacific Coast hops are a staple article of trade?

A. Yes, sir, they are.

Q. Prior to October 24th, 1896, was the market price of prime Pacific Coast hops of the crop of 1896 higher or lower than the price that you named was the market price on that date?

A. It was lower.

Q. What is the market value of prime Pacific Coast hops of the crop of 1896 in New York city at the present time?

A. Five to six cents a pound.

Q. State how long you have been carrying on business; whether in your own name or with a firm?

A. Well, for the last two years and over I have been a member of the firm. I was formerly a clerk.

Q. What is the name of the firm?

A. Herrmann & Company.

CHARLES SCHMIDT.

Deposition of Rudolph Wittenbrock.

RUDOLPH WITTENBROCK, being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

By Mr. JOHNSON:

Q. Please state your name, age, residence, and occupation.

A. R. Wittenbrock. I was born in 1825 and am 72 years old, and live in Sacramento, California. My occupation is that of a hop raiser.

Q. How long have you been engaged in the hop business?

A. About thirty years. I started in 1866 and had hops in 1867.

Q. Do you do any more than grow them and sell them? Do you buy and sell also, or just simply grow and sell?

A. I grow them and I have bought some. Several years ago I bought some hops and shipped them to England, but not to make a business of buying. I grow and sell them.

Q. To what extent have you been growing hops? What I mean is how many bales a year?

A. I have grown from four hundred to six hundred and fifty bales a year. I grew very near seven hundred bales last year.

Q. That has been steadily during the past thirty years?

A. Yes, sir.

Q. Are you now and have you been since you have been engaged in business familiar with the market price of hops?

84 A. Well, as familiar, so far as we can find out what is offered and see what they get.

Q. You consider that you are familiar with the market price of hops?

A. Yes, sir.

Q. In the year 1896 you were growing hops and selling the hops that you grew?

A. Yes, sir

Q. Now, during the time that you have been growing hops and selling them, where have you sold them?

A. I have sold them in Sacramento; last year I sold them to Mr. Horst; the whole crop.

Q. Did you sell them anywhere else than in Sacramento?

A. No, sir.

Q. Didn't you ship some once to England?

A. I shipped some to New York. I didn't ship any in 1896. I sold the whole crop to Mr. Horst.

Q. You have sold hops outside of Sacramento?

A. Oh, yes; I have shipped hops.

Q. On October 24th, 1896, did you sell any hops to anybody?

A. Yes, sir.

Q. How many bales and who to?

A. About five hundred and fifty bales to Mr. Horst.

Q. To Mr. Horst, one of the plaintiffs in this action?

A. Yes, sir.

Q. What kind of hops were they?

A. Those were prime hops.

Q. Prime Pacific Coast hops?

A. Prime Pacific Coast hops of 1896.

Q. What did you receive for them?

A. Five cents a pound.

Q. You sold them where?

A. In Sacramento, California.

Q. Was that the market price for hops?

A. That was a good market price for taking the lot. There was a lot there. That was considered a good price or else I wouldn't have sold them. The market was pretty slack.

Q. What was the market price of prime Pacific Coast hops on October 24th, 1896, in New York city?

A. Well, I couldn't say. There would be about a cent and a half freight and that would make the price six and a half cents a
85 pound, probably. There is a cent and a half a pound freight now to New York city.

Q. Do you know what the market price of prime Pacific Coast hops of the crop of 1897 was on October 24th, 1896, in New York city?

A. No; I couldn't tell.

RUDOLPH WITTENBROCK.

Deposition of H. Uchtmann.

H. UCHTMANN, being called as a witness on behalf of plaintiffs, after being first duly sworn, testified as follows:

Q. State your name.

A. Herman Uchtmann.

Q. Your residence?

A. Portland, Oregon.
Q. Your business?
A. Hop business.
Q. Your age?
A. Age 31.
Q. How long have you been engaged in the business as a hop dealer?
A. I have been engaged in the hop business about nine years.
Q. Under what name did you habitually do business?
A. H. Uchtmann.
Q. How many grades of hops are known to you in your business?
A. Choice, prime, medium, and common; occasionally fancy is brought in, but very rarely used as a grade.
Q. Do you know what the price, what the market price of Pacific Coast hops were in New York city on or about the 24th of October, 1896?
A. 7½ cents.
Q. For what grade or quality?
A. Well, from prime to what they call strictly prime; prime hops would bring that much.
Q. State, if you know, what the market value of that quality of goods was in New York city at the same day for the year 1897?
A. From nine to ten cents.
Q. Was the market price of that quality of goods higher or lower prior to October 24th, 1896?
A. Considerably lower.
Q. State what the price was about October 24th, 1896, for the crop of 1897 of the quality before mentioned.
86 A. From nine to ten cents.
Q. Were they a staple article of trade?
A. Yes, sir.
Q. Whereabouts do you market the goods which you handle?
A. Principally in New York city.
Q. Where do you buy?
A. Oregon and California.
Q. What grade of hops do you deal in?
A. All grades.
Q. Since you have been engaged in the business of a hop dealer at Portland, Oregon, I will ask you if your business has been a continuous one since you commenced it.
A. Yes.
Q. Do you buy and sell on what is known as futures?
A. Yes, sir.
Q. For what length of time do you make contracts of that character?
A. From one to four years.
Q. What is the market price of prime Pacific Coast hops of the crop of 1896 in New York city at the present time?
A. From four to five cents.

Q. Have you any personal interest in the result of this litigation?
A. None whatever.
[NOTARIAL SEAL.] (Signed) H. UCHTMANN.

Deposition of Kola Neis.

KOLA NEIS, being called as a witness on behalf of plaintiff-, after being first duly sworn, testified as follows:

By Mr. HOLMES:

Q. State your name.
A. Kola Neis.
Q. Place of residence?
A. Albany, Oregon.
Q. Age and occupation?
A. 34 years; hop dealear.
Q. How long have you been engaged in dealing in hops?
A. Seven years.
Q. At what place?
A. In the State of Washington, and Oregon.
Q. At what points did you market the hops which you dealt in?
A. We sold them all over the United States, and we sell in London.
87 Q. Since you have engaged in the business of dealing in hops have you followed it continuously to the present time?
A. Yes, sir.
Q. To what extent have you been engaged in the business—I mean about how many bales of hops do you buy a year?
A. From three to seven thousand bales; it depends upon the circumstances.
Q. Are you now, and have you been since engaged in your present business, familiar with the market price of hops?
A. Yes, sir.
Q. Is it a part of your business to post yourself respecting the market value of these goods?
A. Yes, sir.
Q. Do you know what the price of prime Pacific Coast hops of the crop of 1896 was—that is, what it was October 24th, 1896, in New York city?
A. Worth about seven and a half (7½) cents per pound.
Q. How are hops classified in the market where you were dealing?
A. In general?
Q. Yes, sir.
A. They are classified, strictly choice, choice, prime, and common.
Q. Is there a grade known to the market as fancy?
A. Yes, sir. That is what I class as strictly choice or fancy; they represent about the same thing.
Q. Do you know what the market price of prime Pacific Coast hops, of the crop of 1897, was on the 24th day of October, 1896?

A. From 9 to 9½ cents in New York.

Q. During the time you have been engaged in your present business have you had any experience in buying and selling what is known as prime Pacific Coast hops?

A. Yes, sir.

Q. Where were you so engaged in 1896?

A. Salem, Oregon.

Q. Were you engaged in buying and selling for the present crop, as well as for the future year crop?

A. Yes, sir.

Q. You may state, whether or not, if what is known as prime Pacific Coast hops are a staple article of trade?

A. Yes, they are.

Q. Prior to October 24th, 1896, was the market price of prime Pacific Coast hops higher or lower than the price named on that date?

88 A. They were much lower in price.

Q. What was the market price of prime Pacific Coast hops of the crop of 1896, in New York city, at the present time?

A. They are worth four or five or six cents.

Q. You may state under what name you have been carrying on your business?

A. In the name of Faber & Neis; that is the firm name.

(Signed) KOLA NEIS.

Diposition of T. A. Livesly.

T. A. LIVESLY, being called as a witness on behalf of plaintiffs, after being first duly sworn, testified as follows:

By Mr. HOLMES:

Q. State your name, age, residence and occupation.

A. T. A. Livesly, Salem, Oregon; age 33 years.

Q. Your occupation?

A. I am a hop dealer and hop merchant.

Q. Are you also engaged in growing hops?

A. Yes, sir.

Q. How long have you been engaged in the business of hop merchant?

A. I have bought hops for the last nine years.

Q. At what place?

A. In Washington, Oregon and California.

Q. Are you familiar with the different grades of hops known to the trade in the localities you have just mentioned?

A. Yes.

Q. How many grades are known, and what are they?

A. There are about four grades.

Q. Name them.

A. Choice, medium, prime, common and trash.

Q. Is there a grade known as fancy?

A. Yes, there — a good many fancy hops every year.

Q. Are you familiar with the market price of prime Pacific Coast hops in New York city, on or about the 24th day of October, 1896?

A. Yes, I am.

Q. What would that quality known as prime, be worth at the date last mentioned?

A. In New York city?

A. Yes, sir.

89 A. About 7½ cents. I don't remember the exact date, but we sold some there; I think it was about that date, at that price.

Q. What would prime Pacific Coast hops, the crop of 1897, be worth on the 24th day of October, 1896?

A. We were not handling any hops at that time; and I did not pay much attention to the market, but they were worth about nine cents.

Q. Was the market price for this class of hops in New York higher or lower prior to October 24, 1896, than on that date?

A. It was lower.

Q. How much lower?

A. They started at 4½ cents, and gradually went up.

Q. Is the market price for that class of goods in New York, now higher or lower than it was on the date last mentioned?· October 24, 1896?

A. Well, I presume that the market would be about the same now, for that class of goods, possibly lower now; but I don't know what the market is; it certainly would be lower, and I doubt if it is higher.

Q. Is what is known as prime Pacific Coast hops a staple article of trade in the markets of the world?

A. Yes, they are.

Q. Is that true of the goods which are to be produced in the future as well as those already harvested?

A. I think so.

Q. Is there a market price at all times for such goods?

A. Yes.

Q. For such goods produced and to be produced?

A. Yes, always have been.

Q. Since you entered into the business you are now engaged in, as that of a hop merchant, has your occupation been a continuous one?

A. Yes, sir.

Q. Where were you operating mainly?

A. In Washington and Oregon.

(Signed) T. A. LIVESLY.

90 WILLIAM UHLMAN, having been duly sworn on behalf of the defendants, was examined as follows:

By Mr. DICKSON:

Q. Where do you reside?

A. In New York city.

Q. What is your business?
A. The hop business.
Q. How long have you been engaged in that business and where?
A. Twenty-two years, in New York city, and in San Francisco.
Q. How long in San Francisco?
A. Three years in San Francisco, from 1882 to 1885.
Q. Do you buy and sell?
A. Yes, sir.
Q. Where is your firm?
A. My firm in New York is S. & F. Uhlman, and in San Francisco, the style of the firm is William Uhlman & Co., but it is virtually one firm.
Q. How does the amount of your annual sales compare with those of other dealers in New York?
A. I claim to be one of the largest hop dealers in the United States.
Q. What are the different grades of hops?
A. Choice, prime, medium and low grades.
Q. What is the ordinary difference in price between those grades?
A. When prices are ranging say at about ten cents for choice, I should say that prime hops were worth from eight and a half to nine, and medium hops about seven and so on.
Q. There would be from one to two cents between choice and prime?
A. Yes, sir. If prices are higher the difference would not perhaps advance in the same proportion but there might be three cents a pound difference between the different grades providing the prices were very high.
Q. In other words, the difference in prices between grades increases as the market price increases?
A. Yes, sir.
Q. In grading hops is there a gradual decline from the highest quality, that is, the best quality of choice, going down by slight and almost imperceptible gradations?
A. Yes, sir.
Q. Would it be possible then to have a controversy as to
91 whether a particular lot of hops should be classed as choice or prime, or prime or medium?
A. Yes, sir; there would be some difference. There is even a doubt whether a hop is really choice or prime, and it is the same between prime and medium.
Q. Does it require experince, skill and judgment to discriminate?
A. Centainly, considerable.
Q. Would an ordinary customer be able, from looking at a sample of hops, to say whether it was as one or the other?
A. Most of them would not be able to do so.
Q. Would skill, judgment or experience be required on the part of a buyer on the Pacific coast?
A. Yes, sir.
Q. Are there, in point of fact, variations in the quality of the hops which would properly be described as prime, that is to say

would there be prime which would be described as strictly prime and then prime which would be considerably off and approach pretty nearly to medium?

A. Yes, sir. There is certainly a difference of opinion even amongst experts whether a hop is prime, or between prime and choice, or between prime and medium.

Q. Is the hop crop exposed to the same uncertainties as other agricultural products?

A. More so than most of them.

Q. Explain why.

A. First on account of the climatic conditions or the weather. Often hops are looking nice on the poles and during harvest time heavy storms come up, or considerable rain. If so, a crop may become damaged while being picked and may lose color and sometimes flavor. After the harvest it is subjected to a drying process or a curing process, and the hop which might have looked very nice on the pole, might still get spoiled in curing. It is sometimes slack-dried or not sufficiently dried, while at other times it may be high-dried, or overdried and get scorched and spoiled.

Q. If the hops are improperly dried will they keep?

A. Slack hops are often liable to heat, and to become spoiled.

Q. Is it always possible for an expert to properly grade hops without having samples for his own guidance?

A. It is difficult. It is sometimes puzzling for an expert.

(Question repeated.)

A. It is difficult.

Q. That is not an answer to the question. Is it always possible to do so?

92 A. It is not always possible to do so.

Q. Were you acquainted with the prices of hops of the crop of 1896 in the month of October, 1896? I mean of all classes.

A. Yes, sir.

Q. What was the price of prime Pacific Coast hops of the crop of 1896 in the city of New York upon the 24th of October, 1896?

A. About nine and one-half cents—nine and nine and one-half cents.

Q. Can you give the prices for the month of November, December, January and February following?

A. Yes, sir; the price for prime hops in November were twelve to thirteen cents. In December, 11 to 12 cents. In January and February the same prices.

Q. Do you know of actual sales made at those figures?

A. Yes, sir. We made sales to a considerable extent at those prices.

Q. Can you give the prices of prime Pacific Coast hops of the crop of 1896, in the month of March, April, May, June and July, 1897?

A. Yes, sir. March, 10 to 11 cents. April, 8½ to 9½ cents. May, 8 to 9 cents. June, the same. July, the same.

Q. Is there any trade journal which is recognized as authority in the trade, which gives the price of hops?

A. Yes, sir. It is the Journal of Commerce and Commercial Bulletin of the city of New York, which is published daily except Sundays.

Q. Is that a recognized authority in the trade?

A. Yes.

Q. Are you in the habit of reading it daily?

A. I read it pretty nearly every day.

Q. From your own knowledge are you able to say whether those reports are accurate?

A. I consider them accurate, yes.

Q. What is included under the designation of Pacific Coast hops?

A. The States of California, Oregon and Washington.

Q. Then the hops of any one of those States come under the term Pacific Coast hops?

A. Yes, sir.

Q. In the month of October, 1896, was there a market price for the hops of 1897, deliverable in 1898?

A. No, sir; except speculatively.

Q. Were they quoted or sold on the market in any way?

93 A. No, sir; they are never quoted in advance. Futures are not quoted.

Q. Would any price of the kind be actual or fictitious?

A. It would be fictitious.

Q. What was the price of Pacific Coast hops of 1896, in September, 1897?

A. Prime hops were then quoted 7 to 8 cents per pound in New York city; in September, 1897, for the 1896 crop.

Q. Do you mean actual sales?

A. There were actual sales at those figures, yes.

Q. Do you know what the condition of the hop market was in San Francisco or on the Pacific coast during the summer of 1896 for the growing crop of 1896?

A. It was a dull and depressed market. Some dealers advised the growers not to pick their hops, and some growers felt discouraged and could not raise the money to pick their hops, and some of the hops remained unpicked on that account during the season; that is, in the months of July and August, 1896.

Q. Was there any change in market conditions subsequent to that time?

A. There was considerable change, and the principal change occurred in October and November of the same year. The market became very active; an export demand sprung up and prices advanced considerably in October and much more so in November.

By Mr. MOON:

Q. You say you are extensively acquainted on the Pacific coast with hop-growers and hop dealers?

A. Yes, sir.

Q. Do you know Mr. Lovedale, a dealer in hops on the Pacific coast?

A. I know three Lovedales from Sacramento.

Q. Do you know Mr. T. B. Lovedale?

A. Yes, that is Thomas B. Lovedale. I know him personally.

Q. Is he engaged there as a hop-grower or hop dealer?

A. He is principally a hop-grower. At the time I was on the coast he was only a grower. He has since dealt some in hops, and I know that he had some joint-account transactions with the plaintiffs.

Q. Did you know that he was connected in business with Horst Brothers?

A. I do not know within the last year or two, but I know that he has been connected with them in different hop deals in the last six or seven years.

94 Q. Do you know R. Wittenbrock?

A. Yes, sir; that is Mr. Rudolph Wittenbrock. He is a large hop-grower in Sacramento.

Q. Is he engaged in the hop business in any other way except as a hop-grower?

A. No, sir.

Q. Do you know whether or not he had any connection in any way with the firm of Horst Brothers?

A. I do not think he had, except that he sold them hops, perhaps. I do not know whether he did or not.

Q. From your knowledge of Mr. Wittenbrock you know that he is engaged in business only as a hop-grower?

A. Yes, sir. A hop-grower sometimes sells some of his own product to dealers and brewers, but he is not considered a dealer. He is a hop-grower. He might sell some of his own crops direct to brewers.

Q. Do you know T. A. Livesly?

A. Yes, sir.

Q. In what bu-iness is he engaged?

A. He is a hop dealer from the State of Washington. There is one Livesly—I do not know his first name—he is a hop dealer in New York city—formerly of Washington. There are a father and two sons, but I do not know which one T. A. is, I know the old gentleman, and also one of the young men.

Q. Do you know T. A. Livesly?

A. I do not know the initials. I know two of them, but I do not know positively whether he is the one or not.

Q. (Papers shown witness.) These are copies of the New York Journal of Commerce which you have brought over to Philadelphia?

A. Yes, sir. I may say that the figures that I have mentioned I figured from the Journal of Commerce and by my own books, by personal examination of actual sales and by personal examination of the Journal of Commerce of the different dates. I mean actual sales made by me.

Cross examination.

By Mr. PRICHARD:

Q. Do you mean to say that a brewer, who for years has been buying hops for his own trade in large quantities, is not able to determine the difference between the different grades of hops?

A. I say that many brewers are not able to do so.

Q. You do not mean to say that Mr. John Roehm is not able to do so, do you?

95 A. I have never met Mr. John Roehm. I do not know about the man, because I have never met him except about one or two weeks ago. He might be able, and he might not be able.

By Mr. MOON:

Q. You never had any business connection with him of any kind?

A. No, sir.

By Mr. PRICHARD:

Q. It is true, is it not, of almost every kind of merchandise sold on the market, that it requires some expert knowledge for a man to safely buy?

A. Yes, sir.

Q. In the last ten years the range of the prices of hops have run as high as forty and as low as five and six cents, has it not?

A. Yes, sir.

Q. What is it now for prime Pacific Coast hops of the 1897 crop?

A. 14 to 15 cents.

Q. How long has it been in the last year, 1897 crops?

A. Before there was only a speculative price. There was no price established for the 1897 crop until about a month ago.

Q. How long was the 1896 crop during 1896—what was the lowest for prime quality?

A. I think 7 to 8 cents was the lowest.

Q. I have observed that in giving the market price on October 24th, 1896, of prime Pacific Coast hops of the crop of 1896, which you say is in accord with the Journal of Commerce quotations, you have given the very highest figure of the range so cited in the Journal of Commerce. Why do you do that?

A. I beg to refer to the Journal of Commerce of that date. I believe that they are quoted medium and prime, and the lowest is for medium and the highest quotation for prime. If I go by my books I have sold at higher prices such grades than the quotations of the Journal of Commerce.

Q. Do you mean to say that the Journal of Commerce quotation, which you have given, is understood in the trade to mean that all prime hops sell for the highest price of that range?

A. No, sir. I believe it stated 9 to 9½ cents in my answer. The highest quotation there is 9 to 9½, and I believe the next is 10.

Q. What was the range of quotations in the Journal of Commerce?

A. On the 24th it was 7 to 9½ for medium and prime.

Q. You have given 9½ cents as the market price of prime?

A. I said 9 to 9½.

96 Q. And you think that indicates the entire range of prices, from 9 to 9½ for prime Pacific Coast hops?

A. Yes, sir; because I believe at that time, which I see by referring to the Journal of Commerce of the 28th and 29th, the quotations are medium to prime; say 8 to 10 cents. I know also by sales from our own books that we have made sales of prime hops at 9½ and 10 cents about that time.

Q. Did you make no sales for lower than that?

A. No, sir. I wish to say that in the two weeks or ten days from October 23d to the 30th we did a very extensive business in Pacific Coast hops, selling near two thousand bales, and the prices ranged for the different grades from 10 to 14½ cents, and only one sale did we make of ten bales at 9½ cents, all within ten days.

Q. When was your sale at 9½?

A. October 28th. That was medium quality. Not even prime.

Q. What is your next sale before that?

A. On the same day we made several other sales of different grades, one in St. Louis at 14 cents. We sold to two parties in St. Louis on the same date at 14 cents, choice Pacifics.

Q. Delivered where?

A. In St. Louis.

Q. What is your next sale of prime prior to that?

A. October 21st or 22d. Call it the 21st, because I can discern that date better.

Q. Were those primes?

A. Yes, sir. I sold them on the market to a dealer.

Q. What was the price you obtained in that case?

A. 10 cents.

Q. Who was the dealer, and where were they deliverable?

A. The dealer was F. W. Simmons & Son. They were deliverable in New York city. I sold him two hundred and fifty bales of choice hops at 11 cents on that date.

Q. How many bales were the prime?

A. I sold him 55 bales at 10 of prime, and 249 choice at 11.

Q. What is your sale next immediately before that of prime?

A. I did not go back any further than I have stated.

Q. Do I understand you to mean by your answer to Mr. Dickson that it was not a common thing to sell hops of the crop of 1897 at the end of 1896?

A. It was not a common thing, except that some dealers sold futures speculatively. I say the price was not established for the 1897 crop in 1896.

97 Q. Is it not true that brewers very frequently make five-year and sometimes even ten-year contracts for their supply of hops in advance?

A. I never heard of a ten-year contract. I have heard of a five-year contract.

Q. Is not that an ordinary thing in the trade?

A. Not an ordinary thing. It has been done. It was done about four or five years ago to a larger extent than it has been since.

Q. Do you mean to say that you would be unable to quote a price to a brewer who came to you in October, 1896, for hops of the crop of 1897?

A. No, sir; if I felt like selling futures, which I sometimes would and sometimes would not, I would calculate a probable fixed price for him. At the same time, this price may be two or three cents per pound higher than other dealers, and it may be two or three cents per pound lower. It is simply a matter of opinion what I would be willing to sell for.

Q. But that price would be based upon what you could purchase from the producer of the hops a similar amount of hops deliverable in 1897, would it not?

A. That would have considerable weight, of course.

Q. Do you know from observation or from actual sales what prices were obtained in October, 1896, for hops of the crop of 1897?

A. I do, because we made a sale of the 1897 crop about that time, but for choice hops, not prime.

Q. What price did you get for them, and what was the date of the sale?

A. I do not think I put them down, but I know I made that sale. It was 15 cents per pound. My associate made a sale in Baltimore at the same time. I know the price was 15 cents, but I do not know the date.

Q. Those were choice Pacific Coast hops of the crop of 1897, were they?

A. Yes, sir.

Q. Will you verify that price by your book when you return, and if it is incorrect let us know the fact.

A. Yes, sir; as far as the price is concerned I am sure it is right.

Q. How many bales were there?

A. Three hundred.

Q. Deliverable where?

A. In Baltimore.

98 Q. Is there any difference in freight between Baltimore and New York?

A. If shipped direct from the coast the freight is the same.

Q. Ordinarily what is the difference between the market price in New York and the market price in San Francisco? It is the difference in freight, is it not?

A. It is generally the difference in freight, and probably a buying commission of half a cent a pound.

Q. Were hops slow or active in June, 1896?

A. They were very slow.

Q. How about September, 1896?

A. They were slow also, but somewhat livelier than in June.

Q. How about October?

A. They were active.

Q. More active than in September?

A. Considerably more; yes, sir.

Q. How about the hop market in '93—was it uncertain, or pretty well settled?

A. I cannot recall that. I have not looked it up, and it would be very difficult for me to say how the market was every month four years ago.

Q. When you say that these gentlemen who have testified in the cause are hop-growers, and not hop dealers, you do not mean to say that they do not sell their hops, or that they do not have large experience as to market prices, do you?

A. They have not got as much experience as to the market price as dealers have.

Q. Is it not of vital importance for them to watch the market in order to know what prices they are going to get for their crops?

A. Yes, sir; but at the same time they are not as well posted as a general rule as dealers are, not coming in contact with the brewers, nor having any connections in Europe to get cable news, and therefore they are not as well posted as dealers are supposed to be.

Q. Do not some of those hop-growers themselves sell direct to brewers?

A. They do frequently.

Q. You have picked out certain of these journals of commerce, as I understand, in the various months about which you have been asked. How have you taken those numbers? Have you taken the ones that showed the highest prices in the month?

A. No, sir; I have taken them as near to the 24th of every month as possible. When that fell on Sunday I took either the 23d or the 25th.

99 Q. What is the usual range in the market price of prime hops on any day—that is, about how much will the highest and the lowest prices obtainable for prime Pacific Coast hops vary?

A. On the basis of a 10 and 12 cent market for choice I should say the difference in the different ranges between prime is about 1 cent per pound.

Q. Please dismiss from your mind entirely all considerations about choice hops. I am asking you now what is the usual variation between the highest and the lowest price prime Pacific Coast hops on any day.

A. It varies with the valuation of the hops.

Q. What is the range of valuation—about how many cents will that valuation range through in one day?

A. On the basis of 10 and 12 cent prices it would vary one cent per pound.

Q. How about 8 and 9 cent prices?

A. About the same.

Mr. DICKSON: The witness means to say that the prime hops on the same day might sell as low as 8½ or as high as 9½.

The WITNESS: Yes, that is right.

By Mr. PRICHARD:

Q. Do you mean to say that the ordinary variations between the highest and the lowest prices of prime Pacific Coast hops is only one cent a pound on the same day?

A. Yes, sir. Sometimes not as much.

Q. And sometimes a good deal more?

A. Very seldom. Otherwise they would come into the category of medium or choice.

Mr. MOON: The witness does not understand you.

The WITNESS: Yes, I do.

By Mr. PRICHARD:

Q. So that among the dealers in hops in New York or San Francisco who are making contracts for hops deliverable in New York the ordinary difference between the highest and the lowest prices those dealers would obtain would be for prime Pacific Coast hops, one cent a pound?

A. Yes, excepting that if prices would be 20 cents a pound, or 25, then it might vary more.

Q. But on the basis of 8 and 10 cents a pound the variation would be only one cent a pound?

A. Yes, sir.

100 Redirect examination.

By Mr. DICKSON:

Q. If you found a variation of more than one cent a pound on the same day between different dealers, would that indicate to your mind a difference in the market price or a difference between what the two called prime hops?

A. It would either indicate to me a difference of opinion as to quality, or if there was that difference that one of the two parties was not well posted.

Q. In giving the prices which you have given of actual sales made by you, were they special sales, or did they in your judgment fairly represent the market?

A. They fairly represented the market.

Q. Then upon those figures hops could have been bought or sold on those days?

A. Yes, sir.

Adjourned.

But the plaintiff did object to certain of the foregoing testimony of John Roehm, which was in the words following, to wit:

Q. Before that time for how long a period had you been purchasing hops from that firm?

A. Three years.

Q. Were you acquainted with any of the individual members of the firm of Horst Brothers?

A. I only knew Paul Horst.

Q. Was he at that time a member of the firm?

A. Yes, sir.

Q. What was your method of doing business—did you go to New York to purchase hops, or did members of the firm of Horst Brothers come to your place in Philadelphia to sell hops?

A. They came to Philadelphia to my office.

Q. Who was the member of the firm who came to Philadelphia to sell you hops?

A. Paul Horst.

Q. I understand you to say that up to the time of making those contracts you had never seen any other member of the firm?

A. No, sir.

Q. Had you purchased large quantities of hops of Paul Horst, representing the firm, before this time?

101 A. I bought from one hundred and fifty to two hundred bales, two hundred and fifty, three hundred, or three hundred and fifty bales every year.

Q. How long have you been engaged in the brewing business?

A. Ten years.

Q. State whether your position as a brewer, and your connection with that business make you an expert judge of the quality of hops?

A. No, sir.

Q. Did you, in your arrangements and contracts with Horst Brothers, through Paul Horst, rely upon your own judgment in the selection of hops?

A. I depended on him. He told me that he was an expert man. When I made the contract with his brother of course I understood by prime first choice.

Q. But did you rely upon your own judgment in the choice of these hops or upon the judgment of any one else?

A. I relied upon Paul Horst.

Q. Why did you rely upon his judgment?

A. Because he told me that he was an expert man, and I am not.

Q. What had been the result? Had hops that he had delivered to you during this period of time been satisfactory to you and to your trade?

A. Some of them were.

Q. Had you ever had any difficulty at all respecting the quality of the hops, with Horst Brothers, prior to the time of entering into these contracts?

A. Yes, sir.

Q. Whom did you see regarding the adjustment of those difficulties?

A. We sent the hops over to New York. We returned some hops.

Q. When you came to an adjustment of those difficulties what member of the firm did you see?

A. Paul Horst.

Q Had Paul Horst always made those matters right?
A He always made them right.

And the learned judge did exclude the same from consideration and the defendant now excepts to the said exclusion and this exception is duly noted and sealed.

And afterwards, to wit, upon the 27th day of January, 1898, the learned judge did file his findings of fact and his opinions thereon (*pro et* the same).

102 Thereupon the counsel for the said defendant except to the said opinions and the rulings therein contained as follows, to wit:

First. Because the learned judge held that the defendant's contracts with Horst Brothers were not annulled by the dissolution of that firm, nor by the assignment of one of the partner's interest therein to his copartners.

Second. Because the learned judge held that there is nothing whatever in the contracts to indicate that they "involve a relation of personal confidence" between the defendant and Paul R. G. Horst, the member who assigned to his copartners.

Third. Because the learned judge held that a right of action had accrued to the plaintiffs with respect to all the contracts in question at the time this suit was brought.

Fourth. Because the learned judge held that the difference between the price at which subcontracts could have been obtained and the price named in the contracts between the parties is manifestly the amount of the loss actually suffered, and, therefore, must be the correct measure of the damages recoverable.

And the counsel for the defendant further excepts to the entry of judgment in favor of the plaintiff, and against the defendant in the sum of ten thousand one hundred and eighteen dollars and thirty cents ($10,118.30).

Counsel for John Roehm, the said defendant, do now tender this bill of exceptions to the aforesaid exclusion of testimony, to the findings of law and to the entry of judgment by the said court, and do request the seal of the judge aforesaid be put to the same according to the form of the statute in such case made and provided; and thereupon the judge aforesaid, at the request of the said counsel for the said defendant, doth put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided this 28th day of February, 1898.

GEO. M. DALLAS, [SEAL.]
Circuit Judge.

I have no objection to the sealing of this bill.
FRANK P. PRICHARD,
For Plaintiff.

February 26th, 1898.

Endorsed: In the circuit court of the United States, October session, 1896. No. 42. Horst Brothers, etc., *vs.* John Roehm. Bill of exceptions. Filed February 28th, 1898. Samuel Bell, clerk. R. O. Moon, Samuel Dickson.

103 PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,

vs.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.

U. S. C. C., October Sess., 1896. No. 42.

To the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania:

The petition of John Roehm respectfully represents:

That on the 13th and 14th days of December, 1897, the above-entitled cause came on for trial before the Honorable George M. Dallas, judge of the court, without a jury, and thereafter, to wit: on the 27th day of December, 1897, the learned judge did file of record his findings of fact and law, and did enter judgment in favor of the plaintiffs and against the defendant, your petitioner, in the sum of $10,118.30; and that your petitioner is aggrieved by the said findings of the learned judge and he files herewith a specification of errors.

Wherefore your petitioner prays that your honorable court allow a writ of error in the cause to be taken to the United States circuit court of appeals for the third circuit.

And he will ever pray.

JOHN ROEHM.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

John Roehm, being duly sworn according to law, doth depose and say, I am the defendant in this cause, the statements contained in the foregoing petition are true and this writ of error is not taken for purposes of delay, but because I believe injustice has been done.

JOHN ROEHM.

Sworn and subscribed before me this fourth day of March, 1898.

W. C. HARRIS,
Notary Public.

[SEAL.]

104 Endorsed: 42. Oct. sess., 1896, U. S. circuit court. Horst Brothers, to the use, etc., of California, *vs.* John Roehm. Petition for allowance of writ of error to the U. S. circuit court of

appeals Filed Mar. 17, 1898. Samuel Bell, clerk. Allowed. Geo. M. Dallas, cir. J. R. O. Moon, Samuel Dickson.

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,	U. S. C. C., E. D. of Pa., October Sess., 1896. No. 42.
vs.	
JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.	

Assignments of Error.

The appellant assigns for error the following:

First. That the learned judge erred in holding that the defendant's contracts with Horst Brothers were not annulled by the dissolution of that firm, nor by the assignment by one of the partners of his interest therein to his copartners.

Second. That the learned judge erred in holding that there is nothing whatever in the contracts to indicate that they "involve a relation of personal confidence" between the defendant and Paul R. G. Horst, the member who assigned to his copartners.

Third. That the learned judge erred in holding that a right of action had accrued to the plaintiffs, with respect to all the contracts in question, at the time this suit was brought.

Fourth. That the learned judge erred in holding that the difference between the price at which subcontracts could have been obtained and the price named in the contracts between the parties is manifestly the amount of the loss actually suffered, and, therefore, must be the correct measure of the damages recoverable.

Fifth. That the learned judge erred in excluding the testimony of John Roehm in the words following, to wit:

105 Q. Before that time for how long a period had you been purchasing hops from that firm?

A. Three years.

Q. Were you acquainted with any of the individual members of the firm of Horst Brothers?

A. I only knew Paul Horst.

Q. Was he at that time a member of the firm?

A. Yes, sir.

Q. What was your method of doing business; did you go to New York to purchase hops, or did members of the firm of Horst Brothers come to your place in Philadelphia to sell hops?

A. They came to Philadelphia to my office.

Q. Who was the member of the firm who came to Philadelphia to sell you hops?

A. Paul Horst.

Q. I understand you to say that up to the time of making these contracts you had never seen any other member of the firm?

A. No, sir.

Q. Had you purchased large quantities of hops of Paul Horst, representing the firm, before this time?

A. I bought from one hundred and fifty to two hundred bales, two hundred and fifty, three hundred, or three hundred and fifty bales every year.

Q. How long have you been engaged in the brewing business?

A. Ten years.

Q. State whether your position as a brewer, and your connection with that business make you an expert judge of the quality of hops?

A. No, sir.

Q. Did you, in your arrangements and contracts with Horst Brothers through Paul Horst, rely upon your own judgment in the selection of hops?

A. I depended on him. He told me that he was an expert man. When I made the contract with his brother of course I understood by prime first choice.

Q. But did you rely upon your own judgment in the choice of these hops, or upon the judgment of any one else?

A. I relied upon Paul Horst.

Q. Why did you rely upon his judgment?

A. Because he told me that he was an expert man, and I am not.

Q. What had been the result? Had hops that he had delivered to you during this period of time been satisfactory to you, and to your trade?

106 A. Some of them were.

Q. Had you ever had any difficulties at all respecting the quality of the hops, with Horst Brothers, prior to the time of entering into these contracts?

A. Yes, sir.

Q. Whom did you see regarding the adjustment of those difficulties?

A. We sent the hops over to New York. We returned some hops.

Q. When you came to an adjustment of those difficulties what member of the firm did you see?

A. Paul Horst.

Q. Had Paul Horst always made those matters right?

A. He always made them right.

Sixth. That the learned court below erred in entering judgment in favor of the plaintiff and against the defendant in the sum of

ten thousand one hundred and eighteen dollars and thirty cents ($10,118.30).

R. O. MOON,
SAMUEL DICKSON,
For Plaintiff in Error.

Endorsed: 42. Oct. sess., 1896, U. S. circuit court. Horst Brothers, to use of, etc., of California, *vs.* John Roehm, of Pennsylvania. Assignments of error. Filed Mar. 17, 1898. Samuel Bell, clerk, per R. R. O. Moon, Samuel C. Dickson.

PAUL R. G. HORST, a Citizen of the State of New York; E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst, a Citizen of the State of California, and Louis A. Horst, a Citizen of the State of Illinois,

vs.

JOHN ROEHM, a Citizen of the State of Pennsylvania, Residing in the Eastern District of Pennsylvania.

U. S. C. C., October Sess., 1896. No. 42.

Know all men by these presents, that I, John Roehm, as principal, and the American Bonding and Trust Co., of Baltimore city,
107 as surety, are held and firmly bound unto Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, to the use of E. Clemens Horst and Louis A. Horst, in the sum of $22,000, to the payment of which sum the said obligors do bind themselves, their heirs, executors, and administrators firmly by these presents.

The condition of this obligation is, that whereas the said Paul R. G. Horst, E. Clemens Horst and Louis A. Horst, to the use of E. Clemens Horst and Louis A. Horst, have obtained a judgment in the circuit court of the United States for the eastern district of Pennsylvania against John Roehm, in the sum of $10,118.30, as of October sessions, 1896, No. 42; and

Whereas the said John Roehm has presented his petition praying for the allowance of a writ of error, and has filed therewith assignment of error, and said petition has been allowed:

Now, if the said John Roehm shall prosecute said writ of error with effect, and the said judgment be reversed, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

Witness the signature and seal of the party hereto this nineteenth day of March, 1898.

JOHN ROEHM. [SEAL.]
THE AMERICAN BONDING AND TRUST COMPANY OF BALTIMORE CITY,
By its attorney, FRANCIS B. BRACKEN. [SEAL.]

Witness as to surety:
J. EDWARD RYAN.

I have no objection to the approval of the above bond.

FRANK P. PRICHARD,
Attorney for Plaintiff.

Approved:

GEO. M. DALLAS, *Cir. Judge.*

Endorsed: 42. October sessions, 1896, U. S. C. C. Horst Brothers, to the use of, etc., of California, *vs.* John Roehm, of Pennsylvania. Bond on writ of error. Filed March 22, 1898. Samuel Bell, clerk. R. O. Moon, Samuel C. Dickson.

108 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of E. Clemens Horst *et al. vs.* John Roehm, No. 42, October sessions, 1896, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this thirtieth day of April, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

SAMUEL BELL,
Clerk of C. C.

Endorsed: No. 42. Oct. sessions, 1896, circuit court United States, eastern district of Pennsylvania. E. Clemens Horst *et al. vs.* John Roehm. Certified copy of record.

Endorsed on cover: Case No. 17262. U. S. C. C. of appeals, 3d circuit. Term No., 188. John Roehm, petitioner, *vs.* Paul R. G. Horst *et al.* Filed January 16, 1899.

109 In the United States Circuit Court of Appeals for the Third Circuit.

And afterwards, to wit, on the tenth day of October, A. D. 1898, this cause being called for argument on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania, before Hon. M. W. Acheson, circuit judge, and Hon. William Butler and Hon. Andrew Kirkpatrick, district judges, and being argued by counsel for the respective parties, and the court, not being fully advised in the premises, takes further time for consideration thereof.

And afterwards, to wit, on the sixteenth day of December, A. D. 1898, comes the parties aforesaid, by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinion, to wit:

110 In the United States Circuit Court of Appeals for the Third Circuit.

JOHN ROEHM, Plaintiff in Error,
vs.
PAUL R. G. HORST, E. CLEMENS HORST, and LOUIS A. HORST, Late Trading under the Firm Name of Horst Bros., to the Use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

Before Acheson, Butler, and Kirkpatrick, J. J.

KIRKPATRICK, *District Judge:*

In August, 1893, Paul R. G. Horst, E. Clement Horst, and Louis A. Horst, trading as Horst Brothers, entered into a contract with John Roehm, the defendant below, for the sale of one thousand bales of prime Pacific Coast hops, to be delivered at various dates in the future, at an uniform price of twenty-two cents per pound. Of the whole quantity six hundred bales had been delivered, accepted, and paid for at the contract price, so that in July, 1896, there remained undelivered four hundred bales. These were deliverable at the rate of twenty bales per month during each month from October, 1896, to July, 1898, both inclusive, excepting, however, from said period the months of August and September, 1897, when no deliveries were called for. The record shows that this contract was the result of one negotiation and provided for a supply of hops for five years. Ten separate papers were drawn, each covering a period of five months or one season. They all bear the same date; are similar as regards the quantity of hops to be delivered and the price to be paid. They differ only in the time of delivery and the year's crop from which delivery was to be made. In June, 1896, the firm of Horst Brothers was dissolved by the retirement of Paul R. G. Horst. He assigned his interest in the Roehm contract to the remaining partners, who continued the business under
111 the same firm name. Roehm, the defendant below, was notified of this dissolution of the firm and of the transfer of Paul R. G. Horst's interest in the contract to its successors. He thereupon gave notice to the firm that he considered his contract cancelled thereby. Subsequently the firm of Horst Brothers advised the defendant of their ability and willingness to perform the contract, and under date of September 4, 1896, wrote Roehm as follows:

"DEAR SIR: Will you please write us whether you wish us to ship the hops under your contract direct to your city. The contract calls for delivery in New York, and as we ship direct from this coast we can ship to either city at same rate. Consequently there will be a saving to you of freight if we ship to your city direct from here. Awaiting your reply, we are,

"Very truly, HORST BROTHERS."

To this letter Roehm replied, under date of September 14, 1896:

"DEAR SIRS: In response to your letters dated 3d & 4th inst., state that before shipping me any hops always send me samples from which I can select lots, the same as you have been doing in the past.

"Very truly, JOHN ROEHM."

On October 9, 1896, Horst Brothers advised Roehm of twenty bales of hops per October delivery, as called for by the contract, which Roehm, by telegraph, refused to receive, and as supplementary thereto sent the following letter, dated October 24, 1896:

"GENTLEMEN: Yours of October 9, enclosing bill of lading and bill of particulars per twenty bales of hops forwarded me under the terms of contract of August 23, 1895, was received, and I have wired you that I decline to receive the same. I notified you under date of June 27, 1896, that, owing to the dissolution of the copartnership with which I originally contracted and the fact that this firm was no longer in existence, I considered my contract at an end and will make arrangements for purchasing my supplies elsewhere. I am advised that I am under no obligations by that contract to accept supplies from you. If you desire to bill these goods
112 at the current market rate under a new contract, I will accept them if upon inspection they are of the quality desired; otherwise they will remain at the freight station subject to your order.

"Very truly yours, JOHN ROEHM."

No further efforts were made by Horst Brothers to make delivery under the contract, but in January, 1897, this suit was begun by all the original parties thereto, to the use of the firm as at present constituted, to recover damages for its breach. Judgment was rendered in favor of the plaintiffs.

It was asserted by the defendant upon the trial below that his contract with Horst Brothers was annulled by the dissolution of that firm and the assignment by one partner to his copartners of his interest therein. To this proposition we cannot assent. The contract was entered into by Roehm with the plaintiffs jointly, not with either of them separately. The dissolution of the firm in no way affected the obligations of any of the parties. The retiring member, Paul R. G. Horst, was, notwithstanding his withdrawal, answerable to Roehm for the faithful performance of the contract, and in like manner Roehm was still bound to the remaining members of the firm. The same principle which would have permitted Roehm to compel the performance of the contract on the part of the plaintiffs, either in their partnership or individual capacities, enables them in the same way and to the same extent to require him to observe the obligations entered into on his part. As was said in the case of Campbellsville Lumber Co. *v.* Bradley, 96 Kentucky, 494, where a corporation — had a contract to sell certain lumber to a firm for cash refused to deliver after the retirement of

one member of the firm, "It seems the transfer was made upon the dissolution of the firm of Bradley & Wiggins, the benefit of that contract falling to the latter in the division of the assets: but as Bradley did not and could not, in virtue of either the dissolu-
113 tion or transfer to Wiggins, release himself from the undertaking by the firm to pay the defendant for lumber upon delivery, we do not see how the latter was effected nor upon what principle it could be released from its undertaking. If it was, then the dissolution of a partnership would in all cases put an end to each mutual and reciprocal contract the firm may have entered into, however profitable or advantageous. But it does no more take away the rights of individual members than it releases him from obligation to perform." To the same effect are Fish *v.* Gates, 133 Mass., 441; Holmes *v.* Shands, 27 Miss., 40. The cases upon which the defendant below relies will be found upon examination to relate to a different state of facts from those which the record in this case discloses. In some of them the legal plaintiff, as in Boulton *v.* Jones, 2 H. & N., 564, and Boston Ice Co. *v.* Pottie, 123 Mass., 30, or the legal defendant, as in Humber *v.* Hunter, 12 Q. B., 64, was a stranger to the contract, and the court very properly said it to be the law "if a person intends to contract with A, B cannot give himself any rights under it," and that "B could not be bound by a contract to which he was a stranger." Clearly these rules have no application here, where all the parties to the suit are the same who made the contract.

The other cases referred to in this connection by the defendant's counsel relate to a class where reliance has been placed upon the judgment or ability of one of the parties to the contract to perform a particular work. This reliance must be apparent upon the face of the contract or from the nature of the employment. The contract set out in this record is one of ordinary character for the mere sale and delivery of goods. Not only does it fail to show that any re-
liance was placed by the vendee upon the skill or judgment
114 of any of the vendors, but it in express terms provides for the contingency of disputes arising with respect to the quality or condition of the hops which were the subject-matter of the contract. If proof were needed that the defendant did not intend to be guided in his determination of the quality of the hops furnished by the opinion of any of the contracting parties it might easily be gathered from his testimony in the cause and his letter of September 14, 1896, in which he says, "Send me samples from which I can select lots, the same as you have been doing in the past." The memoranda of agreement entered into between the parties and signed August 23, 1893, were regarded by the parties as but evidences of a single contract. They were so construed by the court below, and, we think, properly. This contract had been partially performed, and the refusal of the vendee to receive deliveries of goods under it was most clear and unequivocal and indicative of his intention to repudiate it. There can be no mistaking the meaning of the terms employed by him in so doing. "I am advised," he says, "that I am under no obligation by that contract to accept supplies from you." "If you

desire to bill these goods * * * under a new contract I will accept them, * * * otherwise they will remain at the freight station subject to your order." This was a sufficient evidence of defendant's renunciation of the contract, in which the plaintiffs acquiesced by the bringing of this suit. The refusal to accept was not limited to the particular shipment of October, 1896. It was general as to the whole contract and founded upon the assertion that the contract of August 25, 1896, by the dissolution of the firm of Horst Brothers was ended, and that the defendant was not bound by it, but was free to get his supplies elsewhere.

Under these circumstances the plaintiffs were justified
115 in accepting these declarations as an anticipatory breach of the unperformed provisions of the contract and were not obliged to make further tenders nor wait until the expiration of the time for making the latest deliveries under it before bringing their suit. While the Supreme Court of the United States, in Dingley *v.* Oler, 117 U. S., 490, declined to affirm the doctrine of Hochster *v.* De la Tour, 2 Ell. & Bl., 678, the general consensus of opinion of courts of concurrent authority is in accordance therewith. In the recent case of Marks *v.* Van Eeghen, 85 Fed. Rep., 853, Wallace, C. J., after a careful review of all the authorities, in delivering the opinion of the circuit court of appeals for the second circuit, says: "In view of the overwhelming preponderance of adjudication we think it must be accepted as settled law that where one party to an executory contract renounces it without cause before the time for performing it has elapsed he authorizes the other party to treat it as terminated without prejudice to a right of action for damages; and if the latter elects to treat the contract as terminated, his right of action accrued at once." That the right to begin an action carries with it the right to obtain judgment needs no argument. The only question is, What shall be the measure of damages in cases of this nature? In an action upon an ordinary contract for sale and present delivery the damage is measured by the difference in price as fixed by the contract and the market value at the time of delivery; but that this is not a general invariable rule is apparent from the fact that it cannot be made to serve as a measure in cases like the one at bar, where there is need for an immediate ascertainment, though the delivery by the terms of the contract was not to be made until after the rendition of the judgment. The rule was no doubt
116 adopted because in cases where applicable it furnished the best means by which compensation might be made to the party injured. Where, however, from the nature of the case other means must be employed, the courts do not hesitate to adopt a different rule. Thus in Huntley *v.* Pittsburgh Bessemer Steel Co., 121 U. S., 264, where a contract was made for steel rails of a particular kind, which the plaintiff *were* prevented from manufacturing and delivering by the misconduct of the defendant, the court held that the "proper rule of damages was the difference between the cost per ton of making and delivering and the contract price."

The basis of the recovery was said to be the gain which the plaintiffs would have had if permitted to complete the contract.

The damages of the plaintiffs in this case should be assessed upon the same principle, that of the gain there was to *him* in the contract at the time. The best means of finding this gain was by learning the difference between the price for hops deliverable according to the terms of the contract and the price at which responsible parties in the market were willing to assume similar liabilities. The obligation on the part of the plaintiff that he is entitled to the benefit of the market at each due date of delivery is not tenable, nor can any weight be attached to the suggestion that by this means the plaintiffs get the use of the money before the date called for by the contract. By his own acts he made it necessary an antecedent ascertainment of the damages and is bound to accept the situation caused by his own wrong-doing. Anvil Mining Co. *v.* Humble, 153 U. S., 540. The record shows at what price such subcontracts as are above referred to were obtainable and judgment was rendered in accordance therewith.

It must be affirmed.

117 United States Circuit Court of Appeals, Third Circuit, September Term, 1898.

JOHN ROEHM, Plaintiff in Error,
v.
PAUL R. G. HORST, E. CLEMENS HORST, and LOUIS A. HORST, Late Trading as Horst Bros., to the use of E. Clemens Horst and Louis A. Horst. } No. 33.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

Philadelphia, January 3, 1899.

WM. BUTLER, *J.*

118 UNITED STATES OF AMERICA, *set*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing pages, from one to one hundred and eighteen, inclusive, to contain a full, true, complete, and faithful copy of the original transcript of record in the case of John Roehm, a citizen of the State of Pennsylvania, as plaintiff in error, *vs.* Paul R. G. Horst, a citizen of the State of New York; E. Clemens Horst, a citizen of the State of California, and Louis A. Horst, a citizen of the State of Illinois, late trading under the firm name of Horst Bros., to the use of E. Clemens Horst and Louis A. Horst, as defendants in error, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this eleventh day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

119 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the third circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which John Roehm is plaintiff in error and Paul R. G. Horst, E. Clemens Horst, and Louis A. Horst, late trading under the firm of Horst Bros., to the use of E. Clemens Horst and Louis A. Horst, defendants in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the eastern district of Pennsylvania, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
120 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

121 [Endorsed:] Supreme Court of the United States. No. 677. October term, 1898. John Roehm *vs.* Paul R. G. Horst *et al.* Writ of certiorari.

122 In the United States Circuit Court of Appeals for the Third Circuit.

JOHN ROEHM, Plaintiff in Error,
vs.
PAUL R. G. HORST, E. CLEMENS HORST, and LOUIS A. HORST, Late Trading under the Firm of Horst Brothers, to the Use of E. Clemens Horst and Louis A. Horst, Defendants in Error.

It is hereby stipulated that the certified copy of the transcript of record filed in the office of the clerk of the Supreme Court of the United States, at Washington, together with the petition for a writ

of certiorari, may be taken as a return to said writ, and that no additional copy of the record need be filed.

Philadelphia, January —, 1899.

SAM'L DICKSON,
For John Roehm, Pl'ff in Error.
FRANK P. PRICHARD,
For Paul R. G. Horst et al., to Use, &c., Def'ts in Error.

123 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, by virtue of the foregoing writ of certiorari and in obedience thereto, do certify to the Supreme Court of the United States the consent of the counsel for the respective parties thereto annexed as my return to the said writ.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this first day of February, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

Seal United States Circuit Court of Appeals, Third Circuit.

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

124 [Endorsed:] File No., 17,262. Supreme Court U. S., October term, 1899. Term No., 188. John Roehm, petitioner, *vs.* Paul R. G. Horst *et al.* Writ of certiorari and return. Filed Feb. 2, 1899.